STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: JANUARY 7, 2013)

SIMON CHEVROLET-BUICK, LTD.	:	
v.	:	**C.A. No. PC 2005-5913**
	:	**(consolidated with)**
RHODE ISLAND DEPARTMENT OF ADMINISTRATION; RHODE ISLAND MOTOR VEHICLE DEALER'S LICENSE AND HEARING BOARD; AND LISA SHMARUK	:	
SIMON CHEVROLET-BUICK, LTD.	:	
v.	:	**C.A. No. PC 2005-6375**
RHODE ISLAND DEPARTMENT OF ADMINISTRATION; RHODE ISLAND MOTOR VEHICLE DEALER'S LICENSE AND HEARING BOARD; AND DIANA MONGEON	:	

DECISION

McGUIRL, J. This matter arises before this Court from two consolidated appeals from decisions of the Rhode Island Department of Administration (the Department), in which the Department affirmed two decisions of the Rhode Island Motor Vehicle Dealer's License and Hearing Board (the Board). In those decisions, the Board found that Appellant Simon Chevrolet-Buick, Ltd. (Simon Chevrolet) had engaged in unconscionable business practices by willfully failing to perform written agreements with Lisa Shmaruk (Shmaruk) and Diana Mongeon (Mongeon) in violation of G.L. 1956 §§ 31-5-11(5) and (10). The Board therefore ordered Simon Chevrolet to make all necessary repairs to Shmaruk's vehicle at no cost, and further, to reimburse Mongeon for the repairs

to her vehicle. Simon Chevrolet appealed, and the cases were consolidated. Jurisdiction is pursuant to § 31-5-2.1(d) and G.L. 1956 § 42-35-15.

I

Facts & Travel

Shmaruk and Mongeon each purchased used vehicles from Simon Chevrolet in 2001. (Appellee's Ex. 2: Decision of the Board, Lisa Shmaruk v. Simon Chevrolet-Buick, Ltd., Case No. 4, Finding of Fact ¶ 1 [hereinafter Shmaruk Board Decision]; Appellee's Ex. 2: Decision of the Board, Diane Mongeon v. Simon Chevrolet-Buick, Ltd., Case No. 3, Finding of Fact ¶ 1 [hereinafter Mongeon Board Decision].) When Shmaruk and Mongeon purchased their vehicles, they each also purchased SmartChoice Extended Service Contracts ("Contracts"). (Shmaruk Board Decision, ¶ 2; Mongeon Board Decision, ¶ 2.)

The Service Contracts[1] each provide that "the Agreement holder, apply to the Named Selling Dealer [Simon Chevrolet] for an extended service agreement covering the described vehicle." (Appellant's Ex. A at 1.) Beneath that statement, and in the middle of a block of fine print, the Contract also reads: "Further, I acknowledge and agree that the liabilities of this extended service agreement are with SC&E Administrative Services, Inc. . . . ." In addition, a second statement disclaiming liability, which is buried in a

[1] In the matter of Diane Mongeon v. Simon Chevrolet-Buick, Ltd., Case No. 3, "the Board [was] unable to comment upon the exact terms or language of the agreement at issue" because the parties had mistakenly executed a service contract for a "new car" rather than a "used car." (Appellee's Ex. 2: Decision of the Board, Diane Mongeon v. Simon Chevrolet-Buick, Ltd., Case No. 3 at 3.) Nevertheless the Board found—and it was undisputed—that Mongeon had paid for a SmartChoice Service Contract and no evidence had been presented to suggest that the repairs that were made would not have been allowed under it. Id. Relying on "past precedent of th[e] Board" and the language of the contracts previously considered by the Board, the Board upheld the Contract. Id.

paragraph written in all capitalized fine-print reads: "All obligations and liabilities for repairs covered by this extended service agreement are those of SC&E Administrative Services Inc." Id.

Nonetheless, the Contract placed certain obligations on the Dealer, and made the Dealer the primary contact. Simon Chevrolet's address was listed on the front of the Service Contracts. Id. If the buyer was in need of repairs and within forty miles of Simon Chevrolet, the Service Contract required the buyer to deliver his or her vehicle to the Dealer's repair facility. Id. at 3. Before June 2003, acting under the agreement, Simon Chevrolet performed repairs worth approximately $1402 on Shmaruk's vehicle and approximately $1170 on Mongeon's vehicle. (Shmaruk Board Decision at ¶ 13; Mongeon Board Decision at ¶ 13.)

Simon Chevrolet also executed the Contracts and retained a substantial commission for doing so. A representative of Simon Chevrolet signed the Contracts. (Shmaruk Board Decision, ¶ 18.) Neither Shmaruk's nor Mongeon's contract was signed by a representative of SmartChoice, and the contracts did not denote that the signatory from Simon Chevrolet was acting as an agent of SmartChoice. Further, of the $1595 paid for Shmaruk's Service Contract, Simon Chevrolet retained $624 as commission. Of the $1264 paid for Mongeon's Service Contract, Simon Chevrolet retained more than half—$687—as commission. (Shmaruk Board Decision, ¶ 3; Mongeon Board Decision, ¶ 3.) There is no evidence that Simon Chevrolet disclosed the amount it retained as commission on each contract, or that Mongeon or Shmaruk were aware that the sum paid to Simon Chevrolet was being transmitted to a third party. There is also no evidence that Simon Chevrolet orally disclosed its disclaimer of liability under the service contract.

On June 13, 2003, less than two years after Mongeon or Shmaruk had purchased extended service contracts, SmartChoice's insurer entered into receivership off-shore. (Shmaruk Board Decision, ¶ 5; Mongeon Board Decision, ¶ 5.) As a result of its insurer's insolvency, SmartChoice ceased all operations. (Shmaruk Board Decision, ¶ 5; Mongeon Board Decision, ¶ 5.) Simon Chevrolet made no attempt to individually notify customers who had purchased the SmartChoice Service Contract that their contracts were ineligible as a result of the closure of SmartChoice, as this would entail contacting 300 to 400 individuals. (Shmaruk Board Decision, ¶ 14; Mongeon Board Decision, ¶ 14.)

After SmartChoice's bankruptcy, both Shmaruk and Mongeon brought their vehicles to Simon Chevrolet for repairs. (Shmaruk Board Decision, at ¶ 6; Mongeon Board Decision, ¶ 6.) Simon Chevrolet informed Shmaruk and Mongeon that SmartChoice had ceased operating and their Contracts were invalid, and refused to perform the necessary repairs under the Contracts. (Shmaruk Board Decision, ¶ 7; Mongeon Board Decision, ¶ 8.) Although Simon Chevrolet offered both Shmaruk and Mongeon a small sum to be credited toward the repairs of their vehicles, neither Shmaruk nor Mongeon accepted. (Shmaruk Board Decision, ¶ 8; Mongeon Board Decision, ¶ 9.)

Subsequently, Shmaruk and Mongeon filed complaints with the Board seeking to have the Contracts honored: Shmaruk sought to have the necessary repairs made to her vehicle, and Mongeon sought reimbursement for the expenses incurred in repairing her vehicle. (Shmaruk Board Decision, ¶ 10; Mongeon Board Decision, ¶ 10.) The Board conducted hearings to determine whether Simon Chevrolet violated §§ 31-5-11(3), 31-5-11(5), 31-5-11(10), or 31-5-11(11) by refusing to honor the Service Contracts sold to Shmaruk and Mongeon. (Shmaruk Board Decision at 1; Mongeon Board Decision at 1.)

In addition, the Board assessed whether Simon Chevrolet was obligated under the Service Contracts to perform certain repairs on Shmaruk's motor vehicle and to reimburse Mongeon for certain repairs allegedly covered under the Contract. (Shmaruk Board Decision at 1; Mongeon Board Decision at 1.)

The Board found that Mongeon had a valid service contract when repairs were made, and that Shmaruk had a valid service contract when the vehicle failed. Although the Board did not explicitly find that Simon Chevrolet was a party to the Contracts, it nonetheless concluded that Simon Chevrolet had "willfully failed to perform a written agreement with a buyer of a motor vehicle under § 31-5-11(5)." (Shmaruk Board Decision at 3; Mongeon Board Decision at 3.) Because of Simon Chevrolet's willful violation of § 31-5-11(5), the Board found it liable under § 31-5-11(10) for "having indulged in any unconscionable practice relating to business as a motor vehicle dealer." See § 31-5-11(10). The Board further found Simon Chevrolet responsible for the repairs to the vehicles and ordered it to fully reimburse Mongeon $2570.83 for the costs of repairs to her vehicle and to repair the power steering reservoir, automatic temperature control, and oil pressure to Shmaruk's vehicle at no cost. Id. It did so by reasoning that most car buyers reading the agreement, "would have reasonably believed that [Simon Chevrolet] was not just a mere signatory" but also "jointly liable for the delivery of the services" for which they were contracting. Id.

In reaching this conclusion, the Board relied on the overall impression of the circumstances and provisions of the Contract which "led consumers to believe that [Simon Chevrolet] was their primary and initial contact for any questions or problems regarding the service contract." Id. The Board further found that the "terms of the

[Contract] create[d] ambiguities and doubts which, by operation of settled local law, must be construed against the party relying on the contractual terms to avoid liability and construed in favor of avoiding injustice or inequity." Id.

On June 24, 2005, Simon Chevrolet appealed the Board's decision to the Department pursuant to § 31-5-2.1(d).[2] Following the appeals, Simon Chevrolet sent letters to the Department requesting hearings on both matters. The Department denied Simon Chevrolet's request for subsequent hearings, and affirmed the decisions of the Board. (Appellee's Ex. 3, Decision of the Department, Lisa Shmaruk v. Simon Chevrolet-Buick, Ltd. [hereinafter Shmaruk Department Decision]; Appellee's Ex. 3, Decision of the Department, Diane Mongeon v. Simon Chevrolet-Buick, Ltd. [hereinafter Mongeon Department Decision.])

In those decisions the Department found that the Contracts designated Simon Chevrolet as the primary contact throughout the Contracts and further noted that Simon Chevrolet had executed the Contracts with the customers. (Shmaruk Department Decision at 5; Mongeon Department Decision at 5.) Moreover, the Department found that because Mongeon and Shmaruk had paid Simon Chevrolet, they had reasonably believed that Simon Chevrolet would comply with all the provisions of the Contracts. (Shmaruk Department Decision at 5; Mongeon Department Decision at 5.) In addition, the Department found that Simon Chevrolet was obligated to "act in good faith," and its failure to do so constituted unconscionable practice under § 31-5-11(10). Id. at 5-6. Simon Chevrolet timely filed an appeal to this Court pursuant to §§ 31-5-2.1(d) and 42-

[2] As set forth infra, § 31-5-2.1(d) was amended on July 1, 2008. The amendment abolished the two-tiered review, which the Board had used in this case. Board decisions are now appealed directly to the Rhode Island Superior Court. See § 31-5-2.1(d).

35-15, arguing that the decisions of the Board and Department are clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.

II

Standard of Review

Under § 42-35-15, "[a]ny person, . . . who has exhausted all administrative remedies available to him or her within [an] agency, and who is aggrieved by a final order in a contested case is entitled to judicial review" by the Superior Court. Under this scheme, the Court:

> "may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (1) In violation of the constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Affected by other error or law;
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

The scope of Superior Court's review of an agency decision has been characterized as "an extension of the administrative process." R.I. Pub. Telecomms. Auth. v. RISLRB, 650 A.2d 479, 484 (R.I. 1994). As such, "judicial review is restricted to questions that the agency itself might properly entertain." Id. (citing Envtl. Scientific Corp. v. Durfee, 621 A.2d 200, 208 (R.I. 1993)). "In essence, if 'competent evidence exists in the record, the Superior Court is required to uphold the agency's conclusions.'" Auto Body Ass'n of R.I. v. State of R.I. Dep't of Bus. Regulation, 996 A.2d 91, 95 (R.I.

2010) (quoting Envtl. Scientific Corp., 621 A.2d at 208). Accordingly, this Court defers to the administrative agency's factual determinations provided that those determinations are supported by legally competent evidence. Arnold v. R.I. Dep't of Labor & Training Bd. of Review, 822 A.2d 164, 167 (R.I. 2003). Legally competent evidence is "some or any evidence supporting the agency's findings." Auto Body Ass'n of R.I., 996 A.2d at 95 (quoting Envtl. Scientific Corp., 621 A.2d at 208).

"[T]he Superior Court may not, on questions of fact, substitute its judgment for that of the agency whose action is under review, even in a case in which the court might be inclined to view the evidence differently and draw inferences different from those of the agency." Johnston Ambulatory Surgical Assocs., Ltd. v. Nolan, 755 A.2d 799, 805 (R.I. 2000) (internal quotations and citations omitted). "Questions of law, however, are not binding on the Court and may be reviewed to determine what the law is and its applicability to the facts." Narragansett Wire Co. v. Norberg, 118 R.I. 596, 607, 376 A.2d 1, 6 (1977).

Similarly, the Court accords great deference to the Department's decision. See Envtl. Scientific Corp., 621 A.2d at 207-08. Under the Board's two-tiered standard of review, the Court must confer this deference because "the further away from the mouth of the funnel that an administrative official is when he or she evaluates the adjudicative process, the more deference should be owed to the fact finder." Id. at 208.

"[M]unicipal councils and boards acting in a quasi-judicial capacity must make findings of fact and conclusions of law to support their decisions." Cullen v. Town Council of Lincoln, 850 A.2d 900, 904 (R.I. 2004). In evaluating an agency decision, the court may "imply an ultimate finding from the action taken." Hooper v. Goldstein, 104

R.I. 32, 45, 241 A.2d 809, 816 (1968). That is, a court may rely on a conclusion "found fairly and reasonably by implication in the decision." Yellow Cab Co. of Providence v. Pub. Util. Hearing Bd., 79 R.I. 507, 511, 90 A.2d 726, 728 (1952); see Hooper, 104 R.I. at 45, 241 A.2d at 816. When the board's ultimate conclusion rests necessarily on an unstated, but ascertainable conclusion, "no useful purpose would, of course, be served by ordering the case remande[d] for clarification and completion of the decision." See Hooper, 104 R.I. at 46, 241 A.2d at 816; see also, e.g., Higgins v. Quaker Oats Co., 183 S.W.3d 264, 273 (Mo. Ct. App. 2005) ("Furthermore, a clear agency decision 'impl[ies] a finding of additional facts (beyond those expressly found) necessary to support it.'" (quoting Petersen v. Cent. Pattern Co., 562 S.W.2d 153, 156 (Mo. Ct. App. 1978))); Colorado-Ute Elec. Ass'n, Inc. v. Pub. Utils. Comm'n of Colo., 760 P.2d 627, 641 (Colo. 1988) ("Findings by [an agency board] need not be presented in any particular form, and a necessary finding may be implied from other findings made.").

III

Analysis

On appeal, Simon Chevrolet argues that the Department's failure to hold a second hearing amounted to an unconstitutional deprivation of due process. Further, it argues that the Board's determinations—that Simon Chevrolet failed to perform under a contract in violation of § 31-5-11(5) and engaged in unconscionable business practices under § 31-5-11(10)—are erroneous and characterized by an abuse of discretion. Alternatively, it contends that if held liable under the contract, it should only be obligated to refund a

prorated portion of the retained commission.[3] The Board responds that Simon Chevrolet was not entitled to a second hearing under the statute or the Constitution, and accordingly, the failure to provide a second hearing did not constitute a deprivation of due process. The Board further contends that it did not err in its determinations that Simon Chevrolet was a party to the contract, and that it engaged in unconscionable practices.

A

Simon Chevrolet's Right to a Subsequent Hearing

Simon Chevrolet maintains that following its appeals, the Department had an obligation to conduct subsequent hearings. Accordingly, it argues, the Department's refusal to conduct such hearings denied it due process of law and resulted in prejudice against it. The Board, in contrast, argues that the statute does not provide for a second hearing, and because a second hearing is not constitutionally required, the failure to conduct a subsequent hearing was not an error of law.

[3] In its memorandum, Simon Chevrolet argues that if held liable, it should only be held liable for a pro-rated share, totaling $238.22. It arrives at that amount by multiplying a per day pro-rated value of its commission over the contract term by the days remaining on the contract. Simon Chevrolet fails, however, to provide any statutory provision or case law to support its calculations. The few cases that it does offer to support this proposition are not persuasive. In three of the four cases on which Simon Chevrolet relies, our Supreme Court increased damages awarded in jury trials, concluding that the damages were inadequate to compensate the victims. See Wood v. Paolino, 112 R.I. 753, 756, 315 A.2d 744, 745-46 (1974) (increasing damages from $3,000 to $4,896 based on plaintiff's average pre-injury weekly earning capacity); Quince v. State, 94 R.I. 200, 204, 179 A.2d 485, 487 (1962) (concluding that "$1,250 is far from adequate compensation for the grievous wrongs suffered by plaintiff at the hands of the state's servants"; Cartier v. Liberty Laundry, 49 R.I. 12, 139 A. 473, 474 (1927) (increasing damages to compensate for the extent of the plaintiff's injuries). In the only other case provided by Simon Chevrolet, Page v. Avila, is factually inapplicable to this case. See 55 R.I. 52, 177 A. 541, 543 (1935). Although in that case our Supreme Court decreased a jury verdict as "markedly excessive," that case involved a dispute over the correct hourly fee for legal services. As such, the holding in that case is not persuasive.

At the time of Simon Chevrolet's appeal, the statutory framework provided for a two-tiered process in which the Department reviewed the Board's decision following an appeal.[4] At the first tier of this two-tiered process, a hearing officer, "sitting as if at the mouth of the funnel, . . . hears testimonial and documentary evidence from all affected parties." Envtl. Scientific Corp., 621 A.2d at 207. Then, "as the funnel narrows," the officer "analyzes the evidence, opinions, and concerns of which he or she has been made aware and issues a decision." Id. At the second tier of the process—the "discharge end of the funnel"—sits the Department, which "reviews the [Board's] findings and issues a final decision." Id. at 207-08. Because the Department "sits at the narrowest point of the funnel, [it is] not privileged personally to hear or witness the broad spectrum of information that entered the widest end of the funnel." Id. at 208. As a result, the Board is in the best position to make determinations of credibility of the witnesses that came before it, and the Department and this Court, therefore, defer to its factual findings. See id.

Under the two-tiered process, Simon Chevrolet is not entitled to subsequent hearings before the Department, as "an administrative officer deciding a case upon recommendations by a hearing officer need not actually hear the witnesses testify or hear oral argument." See Envtl. Scientific Corp., 621 A.2d at 207. The Department merely reviews the record of each matter, giving deference to the Board's findings of fact and credibility. In addition, under § 31-5-2.1(d), as amended, Simon Chevrolet's appeal

[4] Section 31-5-2.1(d) was amended on July 1, 2008 allowing Appellant to appeal the Board's decision directly to the Superior Court. As a result of this amendment, the Department no longer plays a role in reviewing the Board's decision. Accordingly, Appellant's argument with respect to his right to a hearing before the Department is moot. Nevertheless, this Court will consider this contention since the Department issued decisions in these matters.

would be strictly within the jurisdiction of the Superior Court. Under that section, the Superior Court merely reviews the record, granting deference to the Board's factual determinations provided they are supported by legally competent evidence. Arnold, 822 A.2d at 167. Similarly, the statute does not require the Superior Court to grant a second hearing on appeal of a board decision. See § 31-5-2.1(d).

In addition, due process does not require that an appellant receive subsequent hearings. Goldberg v. Kelly, 397 U.S. 254, 267 n.14 (1970); Arnett v. Kennedy, 416 U.S. 134, 146 n.12 (1974). Provided that "one hearing will provide the affected individual with a meaningful opportunity to be heard, due process does not require two hearings on the same issue." Crum v. Vincent, 493 F.3d 988, 993 (8th Cir. 2007); see, e.g., Goldberg, 397 U.S. at 267 & n.14; Arnett, 416 U.S. at 146 n.12. Therefore, in this case, in which Simon Chevrolet had its "day in court" by presenting evidence before the Board, due process does not necessitate further hearings. See State v. DeLomba, 117 R.I. 673, 678, 370 A.2d 1273, 1275 (1977); Goldberg, 397 U.S. at 267 & n.14; Arnett, 416 U.S. at 146 n.12; Kota v. Little, 473 F.2d 1, 4 (4th Cir. 1973).

Accordingly, because the statute does not require subsequent hearings, and because such hearings are not constitutionally required, this Court finds that the Department's refusal to hold additional hearings was not in violation of constitutional or statutory provisions. Further, because a second hearing was not required, this Court finds that Simon Chevrolet was not prejudiced by the Department's refusal to conduct subsequent hearings following the appeals.

B

Grounds for Imposing Liability Under Section 31-5-11

Section 31 of the Rhode Island General Laws imposes regulations on the business practices of motor vehicle dealers, such as Simon Chevrolet, and vests in the Board "the power to promulgate rules and regulations . . . to protect the public interest." See § 31-5-2. The Board may suspend or revoke a motor vehicle dealer's license if that dealer willfully fails "to perform any written agreement with any buyer of a motor vehicle" or if the dealer "indulges in any unconscionable practice relating to business as a motor vehicle dealer." Sec. 31-5-11(5), (10). In addition, the Board may order full restitution of any money, motor vehicle repairs, and parts, and may additionally impose a fine. Sec. 31-5-14(a), (c).

Simon Chevrolet contends that the Board abused its discretion by finding that it failed to perform a written agreement with the buyers and committed unconscionable practices. Specifically, Simon Chevrolet argues that it was not a party to the Contracts because it successfully disclaimed liability under an unambiguous contract and because Simon Chevrolet was an agent for a disclosed principal. Furthermore, Simon Chevrolet argues that the Board should not have concluded that it committed an unconscionable practice because it acted appropriately and in good faith at all times. To support this contention, Simon Chevrolet notes that although not contractually obligated, it offered both Shmaruk and Mongeon credit toward repairs to their vehicles. In response, the Board maintains that it did not err in concluding that Simon Chevrolet was a party to the Contract and that there was reliable and substantial evidence that a reasonable consumer

would believe that the dealership was a party to the Contract. The Board further argues that it did not err in finding that Simon Chevrolet committed unconscionable practices.

1

Section 31-5-11(5) Failure to Perform a Written Agreement

a

Disclaimer of Liability

A disclaimer involves an attempt by a party to a contract to avoid liability under that contract. In Rhode Island, these exculpatory provisions are strictly construed, and any provision that purports to exonerate a party from liability will not be enforced unless it is the "specific and unambiguous intent of the parties" to do so. See Di Lonardo v. Gilbane Bldg. Co., 114 R.I. 469, 471, 334 A.2d 422, 423 (1975) (citing Dower v. Dower's, Inc., 100 R.I. 510, 217 A.2d 437 (1966)).

Accordingly, dealers can be party to third-party extended service contracts notwithstanding disclaimers of liability. See, e.g., Villanueva v. Toyota Motor Sales, U.S.A., Inc., 869 N.E.2d 866, 868 (Ill. Ct. App. 2007); Johnson v. Earnhardt's Gilbert Dodge, Inc., 132 P.3d 825, 829 (Ariz. 2006). That is, even if a third-party service contract purportedly disclaims liability in the dealer, if that contract simultaneously obligates the dealer to perform tasks under the contract, or is signed by the dealer, that contract may not indicate the parties' specific and unambiguous intent to disclaim liability. See Villanueva, 869 N.E.2d at 868; Johnson, 132 P.3d at 829; see also Di Lonardo, 114 R.I. at 471, 334 A.2d at 423 (noting that an indemnity provision in a contract is not effective to shift liability to the non-negligent party unless it is "the specific and unambiguous intent of the parties" to do so).

For example in Villanueva, a dealer was found to be "a party to the [extended service] agreement because it identified itself as the issuing and selling dealer and the agreement required plaintiffs to contact [the dealer] for all repair work." Villanueva, 869 N.E.2d at 868. In that case, the court dismissed the dealer's argument that it "merely sold the extended service on behalf of a third party." Id. It concluded that the fact that plaintiffs were required to contact the dealer for repairs was a sufficient basis on which to conclude that the dealer was a party. Id. at 869. Similarly in Johnson, there was a genuine issue of material fact whether a dealer was a party to a service contract. 132 P.3d at 829. Although the contract at issue in that case purported to disclaim liability to the dealer, "[t]he service contract application contained an express signed promise from [the dealer] that it would 'provide service to [the consumer] in accordance with the provisions of the service contract.'" Id. Under these circumstances, the court concluded, "[a] reasonable consumer . . . could interpret [the] language as meaning that [the dealer] was obligated under the service contract to provide service to [the consumer]." Id.

Thus, the Board could reasonably conclude that the provisions requiring Shmaruk and Mongeon to contact Simon Chevrolet for repairs were sufficient to consider Simon Chevrolet a party to the Contract. See Villanueva, 869 N.E.2d at 868–69. The Board noted that the "'Consumer Guide' and other provisions would have led consumers to believe that the Dealer Motors [sic] was their primary and initial contact for any questions or problems regarding the service contract." (Shmaruk Board Decision at 3.) There was further evidence in the record to demonstrate that both Shmaruk and Mongeon did use Simon Chevrolet not only for repairs, but also as a primary and initial contact for

questions and problems with their Service Contracts. (Shmaruk Board Decision, ¶ 13; Mongeon Board Decision, ¶ 13.)

Further, the other findings of fact—that Simon Chevrolet was a signatory to the Contracts, that Simon Chevrolet retained a substantial portion of the Contracts as commission, and that Simon Chevrolet's address was listed on the front of the Contracts—support the conclusion that Simon Chevrolet was a party to both Contracts. See, e.g., id.; Johnson, 132 P.3d at 829; see also Bloxom v. Rose, 144 S.E. 642, 644 (Va. 1928) ("The contract between the parties is not alone to determine the question of agency when the rights of third persons are involved, but that is to be considered along with other facts and circumstances given in evidence which bear upon the question of agency.").

At a minimum, Simon Chevrolet's role would have been unclear and perhaps ambiguous to a consumer. See Paul v. Paul, 986 A.2d 989, 993 (R.I. 2010). That is, whether Simon Chevrolet was a party to the Contract was "reasonably susceptible of different constructions." See id.; Andrukiewicz v. Andrukiewicz, 860 A.2d 235, 238 (R.I. 2004); Flynn v. Flynn, 615 A.2d 119, 121 (R.I. 1992). It is well settled that in these circumstances ambiguous or conflicting provisions must be construed against the drafter. Elliott Leases Cars, Inc. v. Quigley, 373 A.2d 810, 813 (R.I. 1977); Zifcak v. Monroe, 105 R.I. 155, 159, 249 A.2d 893, 896 (1969). "This rule is especially appropriate with respect to contracts of insurance, which we have in the past characterized as contracts of adhesion." Elliott Leases Cars, Inc., 373 A.2d at 813; Pacheco v. Nationwide Mut. Ins. Co., 144 R.I. 575, 337 A.2d 240 (1975); Pickering v. Am. Emp'rs Ins. Co., 109 R.I. 143, 282 A.2d 584 (1971).

Thus, it was not clearly erroneous or an abuse of discretion for the Board to find that Simon Chevrolet was a party to the Contract, or to ultimately conclude that Simon Chevrolet's failure to perform under that Contract constituted unconscionable practices. See § 42-35-15; see also Villanueva, 869 N.E.2d at 868; Auto Body Ass'n of R.I., 996 A.2d at 95 (quoting Envtl. Scientific Corp., 621 A.2d at 208) (noting that legally competent evidence is "'some or any evidence supporting the agency's findings'").

b

Agent for a Disclosed Principal

Simon Chevrolet also seeks to disclaim liability by asserting that it was an agent for a disclosed principal. According to Simon Chevrolet, the fact that the name "SC&E" is listed on the Contract suffices to disclose to consumers both the existence of an agency relationship and that Smartchoice was the principal. The Board, in response, argues that listing SC&E in fine print was not sufficient to disclose the identity of the principal or the fact of a principal-agent relationship.

In Rhode Island, "an agent acting on behalf of a disclosed principal is not personally liable to a third party for acts performed within the scope of his authority." Kennett v. Marquis, 798 A.2d 416, 418-19 (R.I. 2002) (quoting Cardente v. Maggiacomo Ins. Agency, Inc., 108 R.I. 71, 73, 272 A.2d 155, 156 (1971)). Nonetheless, for an agent to avoid personal liability on a contract negotiated for its principal, it must generally disclose both the fact of the agency, and the identity of the principal. Smith v. Pendleton, 53 R.I. 79, 163 A. 738, 740 (1933); Nash v. Towne, 72 U.S. 689 (1866). The agent's un-communicated intent to serve as a representative is not sufficient to relieve the agent of

liability. Seale v. Nichols, 505 S.W.2d 251 (Tex. 1974); 12 Williston on Contracts § 35:35 (4th ed.).

Concerning disclosure of the fact of an agency relationship, sufficient disclosure of a principal is a matter of degree. See Matter of N.V. Stoomvaart Maatschappij "De Maas" (Woodward & Dickerson, Inc.), 1977 A.M.C. 1941, 1943 (S.D.N.Y. 1977); Restatement (Second) of Agency § 4 Comment f. The agent attempting to avoid liability under the contract has the burden of proof in demonstrating that the agency relationship and the identity of the principal were, in fact, disclosed. See, e.g., Port Ship Serv., Inc. v. Norton, Lilly & Co., 883 F.2d 23, 24-25 (5th Cir. 1989); Diamond Match Co. v. Crute, 145 Conn. 277, 141 A.2d 247, 249 (1958); Brown v. Owen Litho Serv., Inc., 179 Ind. App. 198, 384 N.E.2d 1132, 1133 (1979).

Here, this Court finds that the Board did not err in concluding that Simon Chevrolet failed in its burden of proof of establishing that Simon Chevrolet sufficiently disclosed the existence of the agency relationship and the identity of the principal to avoid liability. Simon Chevrolet relied on the fact that the Contract, signed by a representative of Simon Chevrolet and each consumer, states: "[t]he Agreement will be between me and SC&E Administrative Services, Inc." and that the "liabilities of this extended service agreement are with SC&E Administrative Services, Inc." The Board could reasonably conclude that this evidence was not sufficient for Simon Chevrolet to meet its burden of proof, especially in light of the surrounding facts and circumstances: namely, that no representative of SmartChoice signed the Contract; that the representative of Simon Chevrolet who signed the Contract was not designated as an agent in the Contract; that all mentions of SC&E are in fine-print; that there was no oral disclosure of

an agency relationship; and that the expectations and reasonably beliefs of the consumers to the Contracts was that Simon Chevrolet was a party. Under these circumstances, the Court will not overturn the Board's decision. The Board's finding that Simon Chevrolet was a party to the Contract was not in violation of the constitutional or statutory provisions; in excess of its statutory authority; affected by error or law; clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or arbitrary or capricious or characterized by abuse of discretion.

2

Section 31-5-11(10) Unconscionable Practices

Additionally, Simon Chevrolet contends that the Board erred in concluding that it committed an unconscionable practice by failing to perform under the Extended Service Agreement. The Board, in contrast, argues that its decision was not erroneous in view of the reliable, probative, and substantial evidence on the record.

Section 31 of the Rhode Island General Laws authorizes the Board to suspend or revoke a motor vehicle dealer's license or order restitution on that dealer if the dealer "indulges in any unconscionable practice relating to business as a motor vehicle dealer." Sec. 31-5-11(10). Although § 31 authorizes the Board to order such action based on a dealer's "unconscionable practices," the statute does not define the term, and examples of unconscionable practices in the context of third-party warrantors are not provided in the statute, regulations, or the case law. This Court presumes, however, that agencies have the power to interpret their own regulations as part of their delegated lawmaking powers. Cohen v. Brown Univ., 101 F.3d 155, 173 (1st Cir. 1991); Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 150 (1991).

As a result of the paucity of guidance from the legislature, this Court relies on the plain and ordinary meaning of "unconscionable practices," the meaning of analogous provisions in the Rhode Island General Laws, and the meaning that has been attributed to the phrase in analogous state and federal provisions. See Newport Shipyard, Inc. v. R.I. Comm'n for Human Rights, 484 A.2d 893, 897-98 (R.I. 1984) ("It is well-recognized that in construing other statutes, which interpret civil rights guaranteed under both federal and state law, our Supreme Court has accepted guidance from decisions of the federal courts."); see also Casey v. Town of Portsmouth, 861 A.2d 1032, 1036 (R.I. 2004) (using interpretations of Title VII in state discrimination statutes).

Generally, courts and legislatures define "unconscionable practices" as business conduct which falls short of outright fraud, but which nevertheless shocks the conscience of ordinary business men and women. See, e.g., Idaho Code Ann. § 48-603C; 17 Am. Jur. 2d Consumer Protection § 273 (2006); see also Harrington v. Atl. Sounding Co., 602 F.3d 113 n.7 (2d Cir. 2010), cert. denied, 131 S. Ct. 1054 (2011). Whether conduct "shocks the conscience," is a factually intensive determination that requires the fact-finder to weigh the totality of the circumstances, considering, among other factors, whether the dealer took advantage of consumer ignorance, whether the supplier knew that the contract was substantially one-sided, and whether the dealer made a misleading statement of opinion on which the consumer relied. See, e.g., Uniform Consumer Sales Practices Act, § 4; Ohio Rev. Code Ann. § 1345.03 (West 2012).

These factors provide only guidelines, however, and unconscionability is a standard that is broadly interpreted to eradicate all forms of unfair and deceptive practices. See, e.g., Hinchliffe v. Am. Motors Corp., 440 A.2d 810 (Conn. 1981);

Sawyer v. Robson, 915 A.2d 1298 (Vt. 2006). As the U.S. Court of Appeals for the First Circuit noted interpreting an analogous Unfair and Deceptive Acts and Practices (UDAP) statute, the statute "is a statute of broad impact whose basic policy is to ensure an equitable relationship between consumers and persons engaged in business." Veranda Beach Club Ltd. P'ship v. W. Sur. Co., 936 F.2d 1364, 1385 (1st Cir. 1991) (quoting Heller v. Silverbranch Constr. Corp., 382 N.E.2d 1065, 1069 (Mass. 1978)). That is, these UDAP statutes were intended to prevent new forms of deception, and to encompass all forms of wrongful business conduct. See Garland v. Mobil Oil Corp., 340 F. Supp. 1095 (N.D. Ill. 1972).

Further providing support for a broad and inclusive reading of the term "unconscionable practices" is the broad definition given in a similar provision of the Rhode Island General Laws, G.L. 1956 § 6-13.1-1, for unfair methods of competition and unfair or deceptive practices. Section 6-13.1-1 provides that unfair and deceptive practices include "[c]ausing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;" "[c]ausing likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another;" or "[e]ngaging in any act or practice that is unfair or deceptive to the consumer[.]" This Court also presumes that the Board, which is statutorily authorized to determine unconscionable practices, has the capability of interpreting that phrase. See Duffy v. Powell, 18 A.3d 487, 490 (R.I. 2011) ("[I]f a statute's requirements 'are unclear or subject to more than one reasonable interpretation, the construction given by the agency charged with its enforcement is entitled to weight

and deference as long as that construction is not clearly erroneous or unauthorized.'" (quoting State v. Swindell, 895 A.2d 100, 105 (R.I. 2006))).

In this case, the Board concluded that Simon Chevrolet committed unconscionable practices when it failed to perform necessary repairs on Shmaruk's and Mongeon's vehicles. It did so by reasoning that the circumstances surrounding formation of the Contracts and the terms of the Contracts would have created doubts and confusion in the mind of a reasonable consumer. See Duffy, 18 A.3d at 490; Swindell, 895 A.2d at 105. Both purchasers reasonably expected that Simon Chevrolet would honor their Extended Service Contracts and relied on that reasonable expectation to their detriment. Both Shmaruk and Mongeon testified before the Board that they believed that Simon Chevrolet was a reputable company. They also testified that had Simon Chevrolet not offered a Service Contract they would have likely purchased new cars to ensure the protection of manufacturers' warranties. Simon Chevrolet was listed as the primary contact throughout the agreement and was obligated to perform repairs on the vehicles. In fact, the consumers were required to bring Simon Chevrolet their vehicles if they needed repairs and were in a forty mile radius of the dealership. Simon Chevrolet's representative signed the Contract. Under these circumstances, reasonable consumers would likely be confused as to the source of the services or would misunderstand their committed unconscionable business practices was not in violation of the constitutional or statutory provisions; in excess of its statutory authority; affected by error or law; clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or arbitrary or capricious or characterized by abuse of discretion.

a

Good Faith

Simon Chevrolet also argues that it could not have committed an unconscionable practice because it acted appropriately and in good faith at all times. In support of this contention, Simon Chevrolet notes that although not contractually obligated, it offered Shmaruk and Mongeon credit toward repairs to their vehicles. The Board responds that the lack of good faith is not essential to a finding of unconscionable practices, and that even if it were, it did not err in concluding that Simon Chevrolet did not act in good faith.

Good faith is defined as "honesty in fact and the observation of reasonable commercial standards of fair dealing in the trade[.]" Sec. 31-5.1-1(7). Conduct which is not in good faith, honest in fact, and observant of reasonable commercial standards, is unconscionable. Kugler v. Romain, 58 N.J. 522, 544, 279 A.2d 640 (1971). Although good faith can sometimes be demonstrated through a bona fide effort to compromise, good faith is not automatically presumed when any offer to compromise is made. See Baxter v. Sav. Bank of Utica, N.Y., 92 F.2d 404, 406 (5th Cir. 1937). Rather, good faith can be determined only by examining the facts and the totality of the circumstances. See Reiser v. Lombardi, 637 A.2d 780 (R.I. 1994); Sherman v. Carr, 8 R.I. 431, 433 (1867).

The Board could have reasonably found that Simon Chevrolet did act in bad faith. Specifically, the Board notes in its findings of facts that "Simon Chevrolet never investigated the bona fides or financial stability of the SmartChoice service contract program[,]" and "[u]pon being advised of the bankruptcy, Simon Chevrolet made no attempt to individually notify customers who, per its records, purchased a SmartChoice service contract[.]" Mongeon Board Decision, ¶¶ 14-15; see Duffy, 18 A.3d at 490;

Swindell, 895 A.2d at 105. Furthermore, in light of the above findings, the Board might have reasonably concluded that Simon Chevrolet's offer of partial credit toward future repairs was not sufficient to constitute good faith. Thus, there is legally competent evidence on the record to support a finding that Simon Chevrolet acted in bad faith. See Auto Body Ass'n of R.I., 996 A.2d at 95 (citing Environmental Scientific Corp., 621 A.2d at 208).

IV

Conclusion

After review of the entire record, the Court finds that the Board's decisions were not in violation of the constitutional or statutory provisions; in excess of its statutory authority; affected by error or law; clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or arbitrary or capricious or characterized by abuse of discretion. Substantial rights of Simon Chevrolet have not been prejudiced. Accordingly, Simon Chevrolet's appeal is denied, and the charged violations are sustained. Counsel for the prevailing parties shall submit Orders in accordance with this Decision.