

STATE OF WISCONSIN

CIRCUIT COURT

MANITOWOC COUNTY

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Patricia L. Zipperer,  
Plaintiff,

vs.

Case No. 02 CV 233

Supportkids, Inc.,  
Defendant.

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**DECISION AND ORDER ON DEFENDANT'S  
MOTION FOR SUMMARY JUDGMENT**

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**PROCEDURAL BACKGROUND**

The defendant, Supportkids, Inc., ("Supportkids") is engaged in the business of providing assistance to custodial parents who have difficulty collecting court-ordered child support. The plaintiff, Patricia L. Zipperer ("Zipperer"), is one such custodial parent who entered into an agreement with Supportkids to collect a significant child support arrearage. Supportkids did not perform up to Zipperer's expectations and this lawsuit resulted.

In her complaint filed on June 12, 2002, Zipperer alleged that (1) her contract with Supportkids was fraudulently induced by Supportkids' false advertising, (2) Supportkids breached a fiduciary duty to Zipperer in misrepresenting the services it would perform and the means by which it would be compensated, and (3) Supportkids committed violations of the Texas Deceptive Trade Practices-Consumer Protection Act in falsely advertising

its services. Zipperer seeks to enforce her complaint as a class action under Wis. Stats. §803.08 on her own behalf and on behalf of all others similarly situated. On behalf of the class, the complaint seeks declaratory and injunctive relief, rescission or reaffirmation of agreements, restitution of certain fees paid pursuant to the agreements, as well as costs and attorney fees.

Supportkids responded to the complaint by filing a motion to dismiss on August 30, 2002. After the parties submitted briefs and presented oral argument, the court on January 7, 2003 granted the motion to dismiss the breach of fiduciary duty claim, but allowed the fraud claim and the Texas Consumer Act claim to proceed. The court also ruled that this case would be governed by Texas substantive law.

Supportkids subsequently filed an answer denying all of the plaintiff's claims. Supportkids also filed a motion for summary judgment. Each of the parties submitted briefs on Supportkids' motion for summary judgment. In the plaintiff's brief, she requests that she be granted summary judgment as a matter of law, although the plaintiff has not filed a formal motion for summary judgment. An initial hearing was held on the motion on October 24, 2003. Because both parties had requested summary judgment, the court asked if the parties could stipulate to a set of facts which would form the basis for the court's

decision. On December 1, 2003, the court received a Stipulation of Undisputed Facts from the parties. Each party also submitted a supplemental brief in support of that party's position.

#### SUMMARY JUDGMENT STANDARD

Summary judgment is to be granted "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 a judgment as a matter of law". Wis. Stats. §802.08(2). The first step in addressing a motion for summary judgment is to examine the pleadings to determine whether they state a claim for relief. Transportation Insurance Company v. Hunzinger, 179 Wis. 2d 281, 289 (1993). If the pleadings do state a claim for relief, the court must examine the evidentiary record as a whole to determine whether there is a genuine issue as to any material fact. A party seeking summary judgment must "demonstrate...that there is no triable issue of material fact on any issue presented". Heck and Paetow v. Heck, 93 Wis. 2d 349, 356 (1980). Summary Judgment is not to be granted "unless the moving party demonstrates a right to a judgment with such clarity to leave no room for controversy...". Grams v. Boss, 97 Wis. 2d 332, 338 (1980). The parties do not dispute the fact

that the remaining claims in the Complaint do state a claim for relief.

It should be noted that although the parties have stipulated to the existence of virtually all the facts presented by them, summary judgment in favor of one party or the other is not automatically warranted. Even if there are no disputed issues of material fact, summary judgment may not be appropriate if alternative material inferences can be drawn from those undisputed facts. Fischer v. Doylestown Fire Dept., 199 Wis. 2d 83, 87-88 (Ct. App. 1995).

#### **FACTS**

For purposes of deciding the defendant's formal motion for summary judgment and the plaintiff's request for summary judgment in her brief, the court accepts in their entirety the facts to which the parties have stipulated. A copy of the stipulation presented to the court by the parties is attached to this decision and is incorporated by reference into this decision.

The court notes that while all the facts were presented in the form of a stipulation, the court does not interpret the stipulation as agreement by both parties that all of the facts therein are true. For example, the parties have stipulated to the authenticity of the deposition of the plaintiff which has

been provided to the court. The court does not take that stipulation to mean the defendant agrees with everything the plaintiff said in her deposition, only that the document submitted is her deposition. Thus, although this decision is based on a complete stipulation of facts, there are still some disputes as to some facts and to the inferences to be drawn from those facts.

#### DECISION

##### 1. Fraud in the Inducement Claim.

The plaintiff first claims that she is entitled to relief because she was fraudulently induced by Supportkids to enter into her contractual agreement. A review of the authorities cited in Supportkids' memorandum of law in support of its motion for summary judgment demonstrates that the elements of a fraud in the inducement claim are essentially the same in Texas as they are in Wisconsin. That is, the plaintiff must demonstrate that: (1) the defendant made a material representation, (2) the representation was false, (3) the representation was known to be false when made or was made recklessly without regard to whether it was true or false, (4) the misrepresentation was intended to be acted upon, and (5) the misrepresentation was relied upon by the injured party. Balogh v. Ramos, 978 S.W. 2d 696, 701 (Tex. App. 1998); WIS JI-CIVIL 2401.

In her brief, Zipperer argues that Supportkids made the following three separate representations which were untrue: (1) Supportkids bases its fee at a percentage of past-due support collected, (2) Supportkids does not get paid unless it collects, and (3) Supportkids' services are "risk free." Supportkids does not dispute the allegation that such representations were made in its advertising materials. Likewise, Supportkids does not seriously dispute that the representations were not material. Kathleen Kerr, Chief Operating Officer of Supportkids, Inc., admitted the materiality of the advertising representations in her deposition. Kerr Deposition, pp. 126-127. Supportkids does dispute the allegation that any of the three representations cited by the plaintiff were false. The court will address the three representations individually.

The advertising materials which led the plaintiff to retain the services of Supportkids are attached as Exhibits 2, 3, and 4 to the Complaint. The materials are consistent in using the term "past-due child support" to describe the amounts Supportkids will assist a client in recovering. There is nothing in its advertising to suggest that Supportkids will collect and take a fee on the collection of current child support. For example, Exhibit 4 contains representations that "at that point your case will move immediately to an enforcement team that will pursue collection of your past-due child

support." Exhibit 4 also represents that "fees will be deducted from each check collected by Supportkids.com until the past-due child support has been collected." In its argument Supportkids makes much of the fact that the Agreement for Services which a client eventually signs includes the following language within the definition of "past-due support owed":

Regardless of how payments are designated by NCP (noncustodial parent), a party making payments on behalf of NCP, court records or any other documents, it is specifically agreed that any and all amounts received by Supportkids will be credited first to reduce "past-due support owed.

This provision, which will be discussed in more detail later in this decision, is not referenced anywhere in Supportkids' advertising materials. It is first presented to a prospective client when a proposed Agreement for Services is provided to that client. The clear impression from the advertising materials is that Supportkids will take a fee only on past-due child support which it recovers. No reasonable person would construe the advertising to suggest that Supportkids will retain a percentage of current support collected as well. Thus, the representation in the advertising that Supportkids will collect and take a fee only on past-due child support constitutes to a false representation.

The court is satisfied that the misrepresentation concerning the amounts on which Supportkids would collect its

fee was known by Supportkids to be false when made and was intended to be acted upon. The record submitted to the court fully supports this conclusion. Apart from the fact there is nothing in the advertising to suggest Supportkids will take a percentage of current support, Kathleen Kerr testified that Supportkids does in fact offer an "arrears-only" agreement under the terms of which a fee is collected only on actual arrearage payments. It appears this alternative was never discussed with the plaintiff, nor have any procedures been presented to the court to demonstrate how the arrears-only alternative is offered to anyone. Kathleen Kerr testified that she estimated 90 percent of Supportkids' clients have the "full-support" agreement, which was the only option offered to Zipperer. Kerr Deposition, p. 27-28.

The plaintiff also alleges that Supportkids' advertising makes a variety of representations to the effect that Supportkids does not get paid unless it collects on behalf of the client and that such representations are untrue. The court concludes as a matter of law that this statement is not a misrepresentation. Literally, it is true that Supportkids only collects a fee on checks that it collects, and there is no evidence to suggest in this case that Supportkids collected a fee on any checks other than the checks which Supportkids collected. The plaintiff argues that the advertising materials

should not be read so literally and that the representation is untrue because Supportkids retains a fee from all payments it receives, even if Supportkids is not directly responsible for collection of the payment. There are a number of problems with the plaintiff's argument. First, in this case as in many other cases, it would be difficult if not impossible to determine exactly who is responsible for obtaining a payment. The application form demonstrates that Supportkids starts out with a good deal of information provided by the client. Indeed, there is a question which asks if the case is currently active with a governmental agency. In this case, Ms. Zipperer notified Supportkids that she had an open case with Oconto County. One would expect that if an organization such as Supportkids were doing a responsible job, it would attempt to obtain as much information as possible from the client and from the governmental agency supervising the case in order to attempt to locate the payer and obtain payments. The record in this case does demonstrate that representatives of Supportkids did take efforts to locate the payer and his places of employment. It is difficult to determine whether the efforts Supportkids admittedly undertook added anything to generating the payments that were obtained. It is simply not that easy to determine which party or parties are responsible for a particular payment.

The court is unaware of any evidence that has been presented to the court to suggest that any more payments could have been received during the period of time Supportkids represented Ms. Zipperer than were actually received. The record does not indicate whether Steven Thielke was employed and earning wages from which child support payments were not taken during the four months or so that the contractual arrangement existed. The plaintiff, in her deposition, accuses Supportkids of not doing anything for her, but the record does not contain a suggestion of what else Supportkids could have done for her during the short time the contract was in effect. It is admitted that the plaintiff received a number of payments from Supportkids during the term of the contract. One would expect that in the normal Supportkids-client relationship, the client would not already have been actively receiving support payments before the agreement was reached. If the plaintiff did not really need Supportkids' services, it is difficult to argue that Supportkids should not be paid anything under the agreement because the payments may have been received anyway through the efforts of the Oconto County Child Support Enforcement Agency.

The third manner in which the plaintiff claims Supportkids misrepresented its services was by claiming they were "risk-free." The basis for Zipperer's claim is that the services were not risk-free to her because Supportkids retained 34 percent of

all child support payments received, not just those received through Supportkids' efforts or related to arrearages as opposed to current child support. To the extent Ms. Zipperer's claim relates to collecting on current support payments as well as arrearages, the court has addressed the question above and has determined that the advertising was false in that respect. As a separate item, the court concludes as a matter of law that the advertising of services being "risk-free" was not false. The ads do not use the term "risk-free" in a vacuum. Rather, it is used in the following language contained as part of Exhibit 3 to the complaint:

"We offer you a risk-free service. You do not pay up-front fees of any kind--nor do you ever pay legal fees. So, if for some reason we cannot collect, you owe nothing."

This is an accurate description of Supportkids' use of the term "risk-free." The term "risk-free" is often used in a similar context with respect to contingent fee agreements of many kinds. For example, personal injury lawyers often advertise that their services are "risk-free" in the sense that the client does not have to pay a legal fee unless the attorney is successful in collecting damages. Likewise, the typical real estate listing contract is "risk-free." The seller generally does not pay a fee to the broker unless the broker succeeds in obtaining a buyer. These contractual arrangements share other common

characteristics with this case. For example, in the case of an exclusive listing contract, if a not-previously-excluded buyer walks up to the front door of the seller and says I want to buy your home during the term of an exclusive listing contract, the broker gets a commission even though the sale would have occurred without any effort whatsoever on the part of the broker. Law firms generally take a percentage of an entire personal injury settlement even though the defendant may well have been willing to pay something had the injured party not retained the services of the attorney. While there may be definitions of "risk-free" that would warrant a conclusion the representation was made falsely, the term is adequately defined in Supportkids' advertising to describe what the company means by "risk-free." The definition of the term used by Supportkids accurately reflects what Supportkids does and is not measurably different from many other commonly accepted and perfectly legal commercial uses of the term.

In summary, the court concludes that the only misrepresentation in Supportkids' advertising that is false, was known to be false when made, and was intended to be acted upon by prospective clients is the representation that Supportkids' fees will be collected on past-due child support. The final hurdle the plaintiff must climb in order to sustain her claim for fraudulent inducement is to demonstrate that she relied on

this misrepresentation to her detriment. Supportkids argues that the plaintiff was not entitled to rely on any misrepresentations, if there were any, because the agreement Zipperer signed clearly sets forth Supportkids' obligations. A review of those portions of the stipulated facts which relate to this issue is helpful.

The "Agreement for Services" that Zipperer signed is a two-page contract with no fine print. The second paragraph is headed in bold letters: "The Definition of 'Past-Due Support Owed.'" That paragraph reads in its entirety as follows:

"Past-Due Support Owed" is defined throughout this agreement as the sum of all past-due child support or any other monetary obligation, including any interest, due and owing from NCP (NCP is defined in the preceding paragraph as non-custodial parent) as of the date NCP's first payment is received by Supportkids. "Past-Due Support Owed" also includes any support and interest that become past-due after the first payment is received by Supportkids. *Regardless of how payments are designated by NCP, a party making payments on behalf of NCP, court records or any other documents, it is specifically agreed that any and all amounts received by Supportkids will be first credited to reduce "Past-Due Support Owed."* (emphasis added).

Ms. Zipperer testified in her deposition that she received the proposed agreement from Supportkids with other materials in March of 2001 and read the agreement along with the other materials provided more than once. Zipperer Deposition, p. 51 lines 17-19; p. 52 lines 20-25; p. 53 line 1. She testified

twice that there was nothing in the materials she received she did not understand. *Id.* at p. 55 lines 3-5; p. 57 lines 9-12. She made some handwritten notes on the first page of the Agreement for Services to the effect that Mr. Thielke may have had a fishing license or hunting license which might be subject to suspension. The attention she paid to the documents received is further evidenced by the fact that she did not immediately sign the limited power of attorney which was necessary to implement the assignment of her child support payments to Supportkids, but returned the document later than the Agreement for Services only after she had some questions about it answered by Supportkids' representatives. The record demonstrates that Ms. Zipperer had sufficient intelligence to understand the meaning of the contract language, which specified that any payments received by Supportkids would first be credited to reduce past-due support owed. During the course of her employment career, she has been employed as a certified nursing assistant, a machinist, and has also operated a day-care center. She apparently successfully represented herself in two landlord/tenant lawsuits, as well as a presumably small claims collection action for an account related to her childcare business. It is against these facts that Ms. Zipperer's reliance claim must be measured.

The parties do not agree on the legal standard which the court must apply in order to determine whether Zipperer had a right to rely on the intentional misrepresentation which the court has found was made by Supportkids in its advertising. Supportkids contends that even if its advertising included fraudulent misrepresentations which were inconsistent with the language in the Agreement for Services, Zipperer waived her right to claim she relied on any such misrepresentations when she signed the Agreement. Zipperer counters that because Supportkids intended prospective clients to rely on its misrepresentations, she is entitled to a presumption of reliance and is either entitled to summary judgment that her reliance was justified or entitled to a trial on the issue of whether or not she justifiably relied on any misrepresentations.

Both parties cite legal authority from Texas and other jurisdictions in support of their arguments. Unfortunately, none of the authorities cited by either party provide much assistance in evaluating the record in this case. Supportkids cites the court to Humana, Inc.-Louisville v. Eyecare Network, Inc., 2001 WL 840782, an unpublished Texas appeals court decision which includes language that arguably supports a bright line rule that a party's signature on a written contract is sufficient to preclude reliance on any prior inconsistent oral misrepresentations. However, the case does not discuss the

subject in detail and, more significantly, has no precedential value because it is an unpublished opinion. Supportkids also cites the court to Airborne Freight Corp. v. C.R. Lee Enterprises, Inc., 847 S.W. 2d 289 (Tex. App. 1992). As pointed out by Zipperer, the Airborne Freight case involved a misrepresentation made after the contract was signed, not before, and therefore has little relevance to this case. Zipperer cites the court to the case of Formosa Plastics Corp. U.S.A. vs. Presidio, 960 S.W. 2d 41 (Tex. 1998). That case, however, dealt primarily with a question of whether tort damages could be awarded in a fraudulent contract inducement case and did not involve a situation in which it was alleged that any language in the contract itself cured any prior misrepresentation. Without reviewing other authorities cited by the parties, the court simply notes that those cases do not directly address the central issue presented here, that is: Under what circumstances does language in a written contract preclude reliance on prior fraudulent misrepresentations made by one of the parties?

The Wisconsin decision of Ritchie vs. Clappier, 109 Wis. 2d 399 (Ct. App. 1982) provides better guidance on the controlling issue in this case than any of the cases cited by either of the parties. As noted earlier in this decision, the elements of a fraudulent inducement claim are essentially the same in

Wisconsin as they are in Texas. Ritchie first points out that to sustain a fraudulent inducement claim, the reliance must be justifiable, and negligent reliance is not justifiable. *Id.* at 404. The decision notes that "generally, a person is negligent if he or she signs a contract without ascertaining its contents and is not prevented from doing so, (citation omitted)" *Id.* Ritchie also instructs, however, that under some circumstances the fraudulent misrepresentations of the defendant can excuse the plaintiff's failure to sign an agreement without recognizing the significance of its contents:

"The fact that a false representation is made in respect to the paper is not necessarily sufficient to excuse such a person for affixing his signature thereto in ignorance of its contents, unless under all the circumstances, in view of his duty to give reasonable attention to the protection of his own interests, the false representation was still reasonably calculated to and did induce him not to make the investigation which he otherwise would have made. . . ." *Id.* at 405, quoting Standard Manufacturing Co. v. Slot, 121 Wis. 14 (1904).

Ritchie goes on to explain that, "whether the falsity of a statement could have been discovered through ordinary care is to be determined in light of the intelligence and experience of the misled individual. Also to be considered is the relationship between the parties." *Id.* at 405-406, quoting Williams v. Rank & Son Buick, Inc., 44 Wis. 2d 239, 246 (1969). Finally, the court concludes by pointing out

that, "(i)f the facts are undisputed, whether the party claiming fraud was justified in relying on a misrepresentation is a question of law." *Id.* at 406, again quoting Williams, *supra* at 246-247.

Applying the rules of Ritchie to the facts in this case, Supportkids is correct that generally the party to a contract who claims to have been a victim of fraudulent inducement cannot successfully argue reliance in the face of her own negligence in failing to object to contract language that is inconsistent with the prior fraudulent misrepresentations. What Supportkids fails to recognize is that the general rule is subject to exceptions. That is, a Supportkids' client could be excused from being held to the language of the agreement itself if Supportkids' prior misrepresentations were "reasonably calculated to and did induce him not to make the investigation which he otherwise would have made." In determining whether Zipperer was entitled to rely on Supportkids' misrepresentations, the court has to consider her "intelligence and experience," as well as the "relationship between the parties." Because the material facts as they relate to these issues are undisputed, whether or not Zipperer had the right to rely on Supportkids' misrepresentations is a question of law.

Whatever Supportkids' motivations may have been in this matter, the court concludes that Zipperer cannot show she is entitled to be excused from the conditions of the Agreement for Services which she signed. While Zipperer is not an attorney, she testified in her deposition that she did read the materials she received from Supportkids and understood the content of those materials. Zipperer Deposition, pp. 55-57. In fact, she withheld signing the limited power of attorney provided by Supportkids at the time she signed the agreement for services because of questions she had about the power of attorney. *Id.* The Agreement for Services itself is only two pages long and contains no "fine print". The second paragraph is entitled "The Definition of 'Past-Due Support Owed.'" The last sentence of the three-sentence paragraph plainly indicates that "regardless of how payments are designated by . . . court records . . . , it is specifically agreed that any and all amounts received by Supportkids will first be credited to reduce 'past-due support owed.'" Zipperer's handwritten notes on the first page of the Agreement for Services confirm that she read the document. The cover letter that came with the Agreement for Services invited her to call Supportkids if she had any questions about the materials provided, including the Agreement. She did in fact pose

questions to Supportkids about the power of attorney document. It is true that at a later point in her deposition, Zipperer testified that she alternatively possibly read the relevant contract language, must have read the contract language, probably read the contract language, and did not remember if she read the contract language. *Id.* at 94-95. She also testified that the application of the payments received by Supportkids did not make any sense. *Id.* Whatever version of her testimony is correct, the court is satisfied as a matter of law that under the facts of this case any reliance on prior misrepresentations of Supportkids would have been negligent. Ms. Zipperer had held a variety of occupations including running her own childcare business and working as a machine operator. She testified she had experience in a number of prior lawsuits. Given her own level of intelligence, the very short length of the Agreement for Services, the clarity of its language, and the evidence she actually had an opportunity and did read the Agreement, Ms. Zipperer is not entitled to be excused from its terms under the facts of this case as a matter of law. Because of that fact, her fraud in the inducement claim must fail.

2. Texas Deceptive Trade Practices-Consumer Protection Act Claim.

The plaintiff's second cause of action is based on allegations that Supportkids violated a number of provisions in the Texas Deceptive Trade Practices-Consumer Protection Act ("DTPA"). Like most states, Texas has enacted legislation to protect consumers from unfair trade practices. The Texas law is contained in Title 2, Chapter 17 of its Business and Commerce Code. In §17.44, the law provides that:

"(a) this subchapter shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty and to provide efficient and economical procedures to secure such protection."

Section 17.46(a) declares as unlawful "false, misleading, or deceptive acts or practices in the conduct of any trade or commerce." Section 17.46(b) defines the following practices, among others, as false, misleading, or deceptive:

- (5) representing that . . . services have . . . characteristics, . . . benefits, . . . which they do not have . . .
- (7) representing that . . . services are of a particular standard, quality, or grade, . . ., if they are of another;
- (9) advertising goods or services with intent not to sell them as advertised;
- (12) representing that an agreement confers or involves rights, remedies or obligations which it does not have or involve, . . .;

Zipperer argues that Supportkids' advertising practices constitute false, misleading, or deceptive acts or practices under each of the subsections of §17.46(b) quoted above.

For the reasons stated in the preceding section, the court likewise concludes here that the advertising references to "risk-free" and Supportkids' representations that it only collects a fee on payments it receives are not prohibited under the DTPA. The advertising materials adequately define what "risk-free" means and that description is not false or misleading. Likewise, it's true that Supportkids only collects a fee on payments it receives. While the client herself or other governmental agencies may provide assistance in the receipt of payments which Supportkids collects, it is reasonable to assume that the typical Supportkids' client would need Supportkids' help to collect further payments because otherwise there would be no need to retain Supportkids' services.

The court does conclude, again for many of the reasons stated in the first section of this decision, that Supportkids' representations it will only collect a fee on past-due child support are false and violate each of the consumer act provisions cited by the plaintiff. Supportkids falsely represents that its services have benefits which they do not have because its advertising represents only that Supportkids will collect a fee on past-due child support collected when in

fact its Agreement provides that it will collect a fee on current child support as well. Thus, it likewise represents that its services are of a particular standard when in fact they are of another. It advertises its services with the intent not to sell them as advertised. It advertises that it will collect a fee only on past-due child support collected when in fact its agreement allows it to collect a fee on current child support collected.<sup>1</sup> Finally, its advertising represents that an agreement will confer certain remedies and obligations which it does not have. It represents that its Agreement for Services will involve an obligation on the part of the client to pay a fee on past-due child support collected when in fact the fee is assessed on all child support collected. The interrelationship between Supportkids' advertising and the language in its Agreement for Services is the classic "bait and switch" scheme which Supportkids acknowledges the DTPA was designed to prohibit. The product it offers in its Agreement for Services is not the product it describes in its advertising materials.

The fact that Supportkids' advertising violates the DTPA alone does not automatically entitle Zipperer to relief. The relevant portion of §17.50 of the DTPA reads as follows:

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<sup>1</sup> It's true that the Agreement for Services does not increase the total amount on which Supportkids collects a fee; that amount is limited to the total arrearage at the time Supportkids collects the first payment. However, as evidenced by Ms. Zipperer's case, Supportkids would collect the bulk of its fee on what Wisconsin treats as current support before the total arrearage was ever recovered.

"§17.50. Relief for Consumers

- (a) A consumer may maintain an action where any of the following constitute a producing cause of economic damages or damages for mental anguish:
  - (1) the use or employment by any person of a false, misleading, or deceptive act or practice that is:
    - (A) specifically enumerated in a subdivision of Subsection (b) of Section 17.46 of this subchapter; and
    - (B) relied on by a consumer to the consumer's detriment;
  - . . . .
  - (3) any unconscionable action or course of action by any person; or . . .

In order for Zipperer to recover, the offensive advertising of Supportkids must "constitute a producing cause" of Zipperer's damages and must be "relied on by (Zipperer) to (Zipperer's) detriment." Supportkids' misrepresentation of the payments on which it collects a fee may "constitute a producing cause" even if not the only producing cause of Zipperer's losses. However, as the court has already ruled above, the facts in this case do not demonstrate that she relied on those misrepresentations to her detriment. Before Zipperer entered into her contractual agreement with Supportkids, she was made aware that Supportkids intended to treat all amounts it collected as past-due child support, even if the Wisconsin courts treated the bulk of the payments as current child support. The record in this case

demonstrates that the Supportkids' Agreement for Services is short and relatively straightforward. Zipperer read the agreement before she signed it and testified she understood its terms. The facts in this case demonstrate that she could not have relied on the misrepresentations to her detriment because she was aware before she entered into her contractual relationship with Supportkids how the fee would be taken from payments Supportkids collected.

While §17.44 provides that the DTPA is to be "liberally construed and applied to promote its underlying purposes," the court cannot ignore the reliance requirement the Texas legislature has established as a prerequisite to recovery. Interestingly, the reliance requirement in §17.50(a)(1)(B) was not always part of the DTPA, but was added by an amendment to the statute at some point after 1995. See, Alford Chevrolet-Geo v. Murphy, 2002 Tex. App. Lexis 7640. Thus, the Texas legislature went out of its way to specifically impose a reliance requirement on any consumer recovery under the DTPA.

The court is not entirely unsympathetic to Ms. Zipperer's position in this case. The court is satisfied she was the victim of "bait and switch" advertising, but she is left with no individual remedy because she knew of the "switch" before she signed on with the defendant. However, even construing the DTPA liberally in favor of the consumer, the reliance requirement has

to be given meaning. It is this court's conclusion that Texas state authorities could take action against Supportkids for its violation of the DTPA, but the law does not give Zipperer an individual remedy because she knew what she was getting into before she signed the Agreement for Services.

Zipperer's final argument is that Supportkids violated the DTPA by engaging in an "unconscionable action or course of action." This allegation is significant because if Supportkids' advertising is determined to be an "unconscionable course of action," reliance on Zipperer's part would not be a prerequisite to her recovery. The reliance requirement in §17.50(a) relates only to violations of enumerated provisions in §17.46(b).

The term "unconscionable action or course of action" is defined in §17.45(5) to mean "an act or practice which, to a consumer's detriment, takes advantage of the lack of knowledge, ability, experience or capacity of the consumer to a grossly unfair degree." As the Texas Supreme Court noted in Bradford v. Vento, 48 S.W. 3d 749 (2001),

"Unconscionability under the DTPA is an objective standard for which scienter is irrelevant. Ins. Co. of N. Am. v. Morris, 981 S.W.2d 667, 677 (Tex. 1998). To prove an unconscionable action or course of action, a plaintiff must show that the defendant took advantage of his lack of knowledge and "that the resulting unfairness was glaringly noticeable, flagrant, complete and unmitigated.'" Id. (quoting Chastain v. Koonce, 700 S.W.2d 579, 583 (Tex. 1985)).

While the court has determined that Supportkids' advertising was intentionally false and misleading, the court finds as a matter of law that the conduct is not unconscionable. The unfairness was not "glaringly noticeable, flagrant, complete and unmitigated." The Agreement for Services which Supportkids provided notified Zipperer of how Supportkids' fee would be collected before she entered into any agreement with Supportkids. The sentence describing how "past-due support owed" would be determined was straightforward, even if Zipperer did not believe it was fair as applied to her. She was given a chance to read it and decided not to accept Supportkids' services before she was under any type of obligation.

Finally, the court notes that it is Supportkids' false advertising, not its method of collecting its fee in itself which is offensive. A not untypical scenario might involve a noncustodial parent subject to an order requiring payment of child support consisting of \$100 per week current support and \$10 per week on arrears. If this parent had been paying nothing and Supportkids went to great lengths to locate him and get payments resumed, there would be nothing inherently unreasonable about allowing Supportkids to collect its fee on \$110 per week as opposed to \$10 per week. In fact, it's difficult to imagine how Supportkids could afford to provide a meaningful service if it only collected \$3.40 per week in this example. The method of

payment provided for in the Agreement for Services would be perfectly defensible but for the fact it's not consistent with the advertising Supportkids uses to attract clients. For the foregoing reasons, Supportkids' behavior in this case does not rise, or as the case may be, descend to the level of unconscionability.

In conclusion, while Supportkids' advertising is in violation of a number of provisions in the DTPA, Zipperer cannot recover damages against Supportkids because the record demonstrates she did not rely on the unlawful advertisements to her detriment. In addition, Supportkids' advertising was illegal, but not unconscionable.

### **3. Class Action Issue.**

In her complaint the plaintiff asks that this matter be certified as a class action under Wis. Stats. §803.08. Supportkids opposes the request. Because the court is granting summary judgment to Supportkids, the court does not reach the class action issue in this case. The court would note, however, that the reliance requirement which defeated the claims of the plaintiff in this case would not necessarily apply to all other clients of Supportkids. Of necessity the issue would have to be decided on a case-by-case basis because, as noted in Ritchie, there may be circumstances in which a party to a written

contract can be excused from its terms based on fraudulent representations made by the other party leading up to the contract. The individualized nature of the reliance issue, among other concerns, would militate against this action proceeding as a class action had the court not ruled against the plaintiff.

**ORDER**

Based on the foregoing decision, the motion of the defendants for summary judgment is granted and this case is dismissed.

Dated this 17<sup>th</sup> day of February, 2004.

BY THE COURT:

  
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Patrick L. Willis,  
Circuit Judge