

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA  
FOURTH DISTRICT

**STUART ROOFING, INC.,**  
Appellant,

v.

**KARL THOMAS,**  
Appellee.

No. 4D2022-2580

[September 20, 2023]

Appeal from the County Court for the Nineteenth Judicial Circuit, Martin County; Jennifer A. Waters, Judge; L.T. Case No. 20000568CCAXMX.

David C. Borucke of Cole, Scott & Kissane, P.A., Tampa, for appellant.

Neil Strefling PHV, Madison Heights, Michigan, Pro Hac Vice, and Tim B. Wright of Wright, Ponsoldt & Lozeau, Trial Attorneys, L.L.P., Stuart, for appellee.

CIKLIN, J.

This appeal arises out of a dispute over a metal roof installed by the appellant, Stuart Roofing, Inc. (“Stuart Roofing”), on a home owned by the appellee, Karl Thomas (“Thomas”). The single issue before us relates to one count of Thomas’s counterclaim, for violation of Florida’s Deceptive and Unfair Trade Practices Act (“FDUTPA”). After the trial court denied Stuart Roofing’s motion for directed verdict on the FDUTPA count, the jury returned a verdict in Thomas’s favor on that count. Stuart Roofing argues the evidence was insufficient to establish a FDUTPA violation. We agree to the extent Stuart Roofing argues the evidence was insufficient to prove actual damages, and we reverse.

In 2018, the parties entered into a written agreement whereby Stuart Roofing was to remove the existing roof on the Thomas home and replace it with a new metal roof. During the roof installation, Thomas noticed various problems with Stuart Roofing’s workmanship. For example, Thomas asserted that, contrary to the contract’s terms, stainless steel screws were not always utilized, and the metal for the roof was not 24-

gauge. Stuart Roofing transmitted its final invoice, which Thomas refused to pay, and Stuart Roofing filed its complaint for breach of contract, seeking the final invoice amount. In turn, Thomas filed his counterclaim against Stuart Roofing, bringing multiple counts including the FDUTPA claim.

At trial, after Thomas rested his case, Stuart Roofing moved for a directed verdict on the FDUTPA count, asserting that Thomas “has failed to prove any actual damages.” The trial court denied the motion both when originally made and when the motion was renewed after Stuart Roofing concluded its rebuttal case. The jury awarded Thomas \$10,740 on the FDUTPA claim. Stuart Roofing moved to set aside the verdict, again arguing Thomas did not prove actual damages. The trial court denied the motion and entered a final judgment in Thomas’s favor that included the FDUTPA jury award.

On appeal, Stuart Roofing argues the only damages established by Thomas are consequential rather than actual damages, and thus Thomas did not establish a required element of the FDUTPA cause of action. The record supports that contention.

“The standard of review of an order denying a motion for directed verdict is *de novo*.” *Hollywood Med. Ctr., Inc. v. Alfred*, 82 So. 3d 122, 125 (Fla. 4th DCA 2012). “We review the jury’s award of damages to see if it is supported by substantial competent evidence viewing the facts and all reasonable inferences in the light most favorable to the verdict.” *Alvarez v. All Star Boxing, Inc.*, 258 So. 3d 508, 512 (Fla. 3d DCA 2018).

At issue here is an element of a claim brought pursuant to FDUTPA. “[S]ections 501.201-.213, Florida Statutes . . . provide[] a civil cause of action for ‘. . . unfair or deceptive acts or practices in the conduct of any trade or commerce.’” *Smith v. 2001 S. Dixie Highway, Inc.*, 872 So. 2d 992, 993 (Fla. 4th DCA 2004) (quoting § 501.204(1), Fla. Stat.); *see also* § 501.204(1), Fla. Stat. (2020) (providing that “unfair or deceptive acts or practices in the conduct of any trade or commerce are . . . unlawful”); § 501.211(2), Fla. Stat. (2020) (providing for an award of damages and attorney’s fees “[i]n any action brought by a person who has suffered a loss as a result of a violation of this part”).

“To bring a FDUTPA claim for damages, a plaintiff must establish three elements: 1) a deceptive act or unfair practice; 2) causation; and 3) actual damages.” *Stewart Agency, Inc. v. Arrigo Enters., Inc.*, 266 So. 3d 207, 212 (Fla. 4th DCA 2019).

Stuart Roofing correctly argues that Thomas did not establish actual damages, as required to recover on a FDUTPA claim. See § 501.211(2), Fla. Stat. (2020) (providing for recovery of “actual damages” to “a person who has suffered a loss as a result of a violation of this part”). This court has elaborated on a FDUTPA violation’s measure of damages:

Generally, the measure of actual damages is the difference in the market value of the product or service in the condition in which it was delivered and its market value in the condition in which it should have been delivered according to the contract of the parties . . . A notable exception to the rule may exist when the product is rendered valueless as a result of the defect – then the purchase price is the appropriate measure of actual damages.

*Fort Lauderdale Lincoln Mercury, Inc. v. Corgnati*, 715 So. 2d 311, 314 (Fla. 4th DCA 1998) (quoting *Rollins, Inc. v. Heller*, 454 So. 2d 580, 584 (Fla. 3d DCA 1984)); see also *The Democratic Republic of the Congo v. Air Cap. Grp., LLC*, 614 F. App’x. 460, 472 (11th Cir. 2015) (“[P]laintiffs must marshal evidence to prove the gap in value between what was promised and what was delivered, *unless* defendant palmed off a product that was truly worthless. In the latter situation, plaintiff may recoup the full price he paid for the valueless good or service.” (emphasis in original)). “For purposes of recovery under FDUTPA, ‘actual damages’ do not include consequential damages.” *Rollins, Inc. v. Butland*, 951 So. 2d 860, 869 (Fla. 2d DCA 2006); see also *Smith*, 872 So. 2d at 994 (“Actual damages, as pertaining to FDUTPA, does not include ‘actual consequential’ damages.”); *Morgan v. Enter. Leasing Co. of Fla., LLC*, No. 9:21-cv-80549, 2021 WL 4709787, at \*5 (S.D. Fla. Oct. 8, 2021) (finding that a customer’s out-of-pocket expenses caused by a rental car company not providing promised vehicle with disability accommodations were consequential damages not cognizable under FDUTPA). “Evidence as to the amount of damages cannot be based on speculation or conjecture, but must be proven with certainty.” *Corgnati*, 715 So. 2d at 314.

At trial, as to the question of FDUTPA damages, the jury was properly instructed that actual damages were the difference between the market value of what Thomas received and the market value of what he bargained to receive. Thomas presented evidence of the market value of the roof for which he contracted vis-à-vis the contract price, which was \$65,000. However, Thomas failed to present evidence of the market value of the roof which he received.

Thomas points to the testimony of his wife and his expert as

establishing damages. Thomas's wife testified leaking began when Stuart Roofing's employees failed to place tarps on the roof after they tore off the original roof. The roof installation was completed in May 2019. More than two months later, leaks still occurred. Thomas's wife further testified photographs taken in 2019 and 2020—after the new roof was installed—showed leaks and water damage. She pointed out in a photo she took in October 2020 that “it looked like new plywood was already not in good shape.” She also testified to exhibits showing she and Thomas paid \$9,567 for house repairs related to the roof leaks, including photocopies of checks and invoices that she testified were related to expenses incurred due to damages caused by Stuart Roofing's roof installation. She identified checks made out to “the guy that did the repairs on the kitchen cabinets,” a painter, a carpet cleaner, and a landscaper for re-sodding. Exhibits 17 and 18 comprise photographs of alleged damage to the roof and the home's interior.

Thomas's expert in home inspections testified about inconsistencies in the materials for which Thomas contracted and the materials actually used. He further testified stainless steel screws are preferable in a coastal environment, and an “excessive” number of nails “missed the truss,” thus posing a potential issue with securing the plywood to the roof.

None of this evidence established the market value of the roof that Thomas received. The evidence of amounts paid for repairs constitutes evidence of consequential damages, which are not recoverable in a FDUTPA claim.

How the jury arrived at the \$10,740 award for the FDUTPA claim is not apparent. Even if the wife's testimony and the photographic evidence of the leaks supported a finding that the roof which Thomas received was “valueless,” then the appropriate measure of damages is the purchase price. But the jury was not instructed it could award damages based on the purchase price, and the jury's award of \$10,740 had no relation to the purchase price. The figure thus appears to have been based on speculation, as no amount was “proven with certainty.” *Corgnati*, 715 So. 2d at 314.

Based on the foregoing, we hold the trial court erred in denying Stuart Roofing's motion for a directed verdict on the FDUTPA count where Thomas had not established actual damages. We reverse and remand for the trial court to enter a directed verdict in Stuart Roofing's favor on Thomas's FDUTPA claim.

*Reversed and remanded with instructions.*

MAY and ARTAU, JJ., concur.

\* \* \*

***Not final until disposition of timely filed motion for rehearing.***