

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....iii

STATEMENT OF THE FACTS.....1

ARGUMENT.....4

Proposition of Law:

PAROL EVIDENCE CANNOT BE OFFERED BY A PARTY IN A CLAIM BROUGHT UNDER THE CONSUMER SALES PRACTICES ACT TO ALTER A TERM OF A WRITTEN CONTRACT WHERE THAT TERM IS CLEAR AND UNAMBIGUOUS.....4

A. The holding of the Fifth District is contrary to the prior holdings of this Court.....4

B. Other jurisdictions do not allow parol evidence to contradict clear and unambiguous terms of a contract even when the claim is based on fraud or a consumer law.....7

C. The absolute prohibition against the application of the Parole Evidence Rule in CSPA cases adopted by the Fifth District is an unnecessary restriction and against public policy.....10

CONCLUSION.....13

CERTIFICATE OF SERVICE.....14

APPENDIX App. Page

Notice of Appeal To the Supreme Court of Ohio, Case No. 08-1337 (July 10, 2008)..... 1

Opinion of Stark County Court of Appeals, Case No. 2007-CA-00187 (May 27, 2008).....3

Judgment Entry of Stark County Court of Appeals, Case No. 2007-CA-00187 (May 27, 2008).....12

Judgment Entry of the Stark County Court of Common Pleas, Case No. 2006CV03856 (June 12, 2007).....13

R.C. Chapter 1345..... 15

TABLE OF AUTHORITIES

CASES

Alling v. Universal Manufacturing Corporation, 5 Cal. App 4th 1412; 7 Cal. Rptr2d 718, 1992 Cal. App. Lexis 572 8, 9

AmeriTrust Co. v. Murray (1984), 20 Ohio App.3d 333, 335, 20 Ohio B. 436, 486 N.E.2d 180.. 6

Aultman Hosp. Assn. v. Community Mut. Ins. Co. (1989) 46 Ohio St.3d 51..... 11

Dice v. Akron, C. & Y. R. Co., 155 Ohio St. 185, 191 10

Downs dba Atlas Portable Buildings v. Deaton 864 S.W.2d 553; 1993 Tex App.Lexis 3079 10

Ed Schory & Sons, Inc. v. Soc. Natl. Bank (1996), 75 Ohio St. 3d 433, 440, 1996 Ohio 194, 662 N.E.2d 1074 6

Einhorn v. Ford Motor Co. (1990), 48 Ohio St. 3d 27, 29, 548 N.E.2d 933, 935..... 4

Frey v. Vin Denere, Inc. (1992) 80 Ohio App.3d 1 4

Galmish v. Cicchini (2000), 90 Ohio St.3d 22, 734 N.E.2d 782 5, 6

Marion Production Credit Asso. v. Cochran (1988) Ohio St.3d 265 10

Richards v. Luxury Imports of Palm Beach, Inc., 877 So.2d 944, 2004 Fla.App. Lexis 11236..... 9

Thomas v. Sun Furniture & Appliance Co. (1978), 61 Ohio App. 2d 78, 81, 399 N.E.2d 567, 569. 4

Torrance v. A, S & L Motors, LTD., 119 NC App.552, 459 SE 2d 67, 1995 NC App. Lexis 549. 8

Wall v. Plant Ford, Inc., 159 Ohio App.3d 840, 825 N.E.2d 686, 2005-Ohio-1207..... 4, 5, 6, 7

STATUTES AND ADMINISTRATIVE RULES

R. C. Chapter 1345 (Consumer Sales Practices Act)..... 4

R.C. 1345.02(A)..... 4

R.C. 1345.02(B)(1) 10

R.C. 1345.02(B)(2) 8,10

ADDITIONAL AUTHORITIES

Akron Law Review 6

Black's Law Dictionary (8th Edition 2004) 3

STATEMENT OF THE FACTS

This lawsuit was filed by Plaintiff, Reynold Williams (hereinafter "Williams") on October 3, 2006, exactly two years after he purchased a 2004 GMC Yukon SUV from the Defendant, Spitzer Autoworld Canton, LLC (hereinafter "Spitzer"). Williams set forth six separate claims in his complaint, among them was a claim that the trade-in allowance stated in the written contract he signed was \$1,000 less than the amount he was promised during negotiations and therefore was a violation of Section 1345.02 of the Ohio Revised Code. (Appx. 4, 5)

Williams signed a fully integrated purchase agreement that clearly indicated he was being given a credit of \$15,500 for the 2003 Ford truck he traded-in to purchase the new Yukon. The dollar amount of the trade-in allowance (\$15,500) was clearly set forth in a large, white box outlined in green with a long green arrow pointing to it. It is the most prominent term on the written contract. (Appx. 4, 7)

As part of the contract, Williams also estimated the pay off of his trade-in to be \$29,000 but, in fact, the actual payoff of the trade-in was \$31,000 or \$2,000 more than his estimate. After the purchase, Williams physically brought into the dealership the additional \$2,000 to cover the difference on the estimated pay off. He did this by bringing in one check for \$1,000 on October 28 of 2004 and a second check for \$1,000 on December 3rd of 2004. (Appx. 4) On neither occasion did he complain about or even raise the issue of the \$1,000 shortage on the allowance for his trade-in, even though he admitted being aware of this alleged discrepancy at the time he brought in the money. (Appx. 4; Supp. 1-2, Tr. p. 118-119)¹

¹ Plaintiff did not dispute that the figure of \$15,500 was on the contract at the time he signed it, but claimed he could not recall focusing on it. He did admit that a few weeks later he did see it, but did nothing about it and still brought in the \$2,000.

Then, two years later, without ever having complained to Spitzer about the \$15,500 trade-in allowance actually stated in the written contract (versus the \$16,500 he claims was promised to him during negotiations), Williams filed this lawsuit. (Supp. 3, 4; Tr. 119-120)

All of the other five claims made by Williams in his lawsuit were either dismissed by him prior to trial; dismissed by the trial court on a directed verdict; or, rejected by the jury which heard the case. (Appx. 5)

The jury found in Williams' favor on his CSPA claim regarding the trade-in allowance. The jury then awarded him the \$1,000 difference between the \$15,500 stated in the contract and the \$16,500 Williams claimed was promised to him. The jury also awarded Williams \$1,500 in non-economic damages despite no evidence of non-economic damages. (Appx. 5)

The trial court entered a judgment on the jury's verdict on May 10, 2007 and later trebled the damages and ordered Spitzer to pay \$7,000 additional, in legal fees. An appeal was taken to the Court of Appeals for the Fifth Appellate District (Stark County).

Appeal to the Fifth District

At the trial court and on appeal, Spitzer challenged the right of Williams to offer parol evidence regarding the amount of the trade-in allowance set forth in the written contract. (Appx. 5) Williams' parol evidence consisted solely of his own, unsupported testimony, that the trade-in allowance, set forth in the written contract he signed, was \$1,000 less than the amount that was promised during negotiations. Had that parol evidence not been allowed in to contradict this clear and unambiguous term of the contract, Williams would have failed on this claim. (Appx. 7, 8)

The Court of Appeals held that in a CSPA claim, parol evidence is allowed in to contradict even a clear and unambiguous term of a consumer contract, despite the fact that the same evidence would have been disallowed under a breach of contract claim.

The Court stated: "Because the gravamen of appellee's case is based on the aforesaid section of the CSPA, we hold the parol evidence rule does not apply under these circumstances and that a directed verdict and judgment notwithstanding the verdict were properly denied."

(Appx. 8)

It is from this decision by the Fifth District that Spitzer has filed this appeal.

ARGUMENT

PROPOSITION OF LAW:

PAROL EVIDENCE CANNOT BE OFFERED BY A PARTY IN A CLAIM BROUGHT UNDER THE CONSUMER SALES PRACTICES ACT TO ALTER A SPECIFIC TERM OF A WRITTEN CONTRACT WHERE THAT TERM IS CLEAR AND UNAMBIGUOUS.

A. The holding of the Fifth District is contrary to the prior holdings of this Court

The purpose of R.C. Chapter 1345, the Ohio Consumer Sales Practices Act (hereinafter “CSPA”), is to protect consumers from suppliers who commit deceptive (fraudulent) or unconscionable sales practices. *Thomas v. Sun Furniture & Appliance Co.* (1978), 61 Ohio App. 2d 78, 81, 399 N.E.2d 567, 569. It is a remedial act that courts liberally construe in favor of the consumer. *Einhorn v. Ford Motor Co.* (1990), 48 Ohio St. 3d 27, 29, 548 N.E.2d 933, 935. Section 1345.02(A) prohibits a supplier from committing an unfair or deceptive act or practice in connection with a consumer transaction either before, during, or after the transaction. *Frey v. Vin Denere, Inc.* (1992) 80 Ohio App.3d 1. However, nothing in the CSPA (or its history) indicates that parol evidence may be allowed to directly contradict a specific, material term of a written, integrated contract. The case law has, until now, allowed parol evidence only where (1) a consumer contract was **missing** a material term of the transaction that had been promised during or after negotiations; or (2) to clarify a term that was ambiguous; or (3) where fraud was alleged to have induced the contract itself. *Wall v. Planet Ford, Inc.*, 159 Ohio App.3d 840, 825 N.E.2d 686, 2005-Ohio-1207

Noting the uncertainty with regard to the application of the parol evidence rule, the Court of Appeals for the Second District in *Wall*, ruled that a number of common law defenses, including the Parol Evidence Rule, do not apply to a claim under the CSPA “because the claim is

based not on the contract, but on oral or other misrepresentations.” The facts and the claims in *Wall*, however, were different from those in the case at bar in a very significant way. In *Wall*, the consumer’s claim was based on fraud and alleged that a promise was made by the dealer, during negotiations, to pay off her home equity loan, a loan which had been used to finance her trade-in. The contract *Wall* signed did not make any mention of a home equity loan payoff. Thus, parol evidence was allowed to establish the promise the dealer made to the consumer to convince her to enter into the contract; namely to pay off her home equity loan as part of the deal. This was the type of deceptive act the CSPA was designed to prevent. The Second District did not have to make an absolute rule prohibiting the application of the Parol Evidence Rule in a CSPA claim because the case law in Ohio already allowed for an exception to the Parol Evidence Rule in such a case.

In the present case, the “promise” to give Williams \$16,500 for his trade-in directly contradicts the actual contract which states the trade-in allowance is \$15,500. The “promise” was actually a term of the contract that Williams now wants to change. This sort of argument to circumvent the parol evidence rule was specifically rejected by this Court in *Galmish v. Cicchini* (2000), 90 Ohio St.3d 22, 734 N.E.2d 782, where this court stated the following: “However, the parol evidence rule may not be avoided by ‘a fraudulent inducement claim which alleges that the inducement to sign **the writing was a promise, the terms of which are directly contradicted by the signed writing**’”. (emphasis added) *Id.* at 790. This Court went on to note: “The parol evidence rule states that ‘absent fraud, mistake or other invalidating cause, the parties’ final written integration of their agreement may not be varied, contradicted or supplemented by evidence of prior or contemporaneous oral agreements, or prior written agreements.” *Id.* at 790

To further clarify its position, the majority in *Galmish* went on to quote from an article in the Akron Law Review as follows: "...the Parol Evidence Rule will not exclude evidence of fraud which induced the contract. But, a fraudulent inducement case is not made out simply by alleging that a **statement or agreement made prior to the contract is different from that which now appears in the written contract**; quite to the contrary, attempts to prove such a contradictory assertion is exactly what the Parol Evidence Rule was designed to prohibit". (emphasis added) Id at p. 790.

In this case, Williams did not claim that some promise was made during negotiations that did not make it into the written contract; he claimed that the "promise" in the negotiations was to give him \$16,500 for his trade in, which directly contradicts the \$15,500 amount clearly stated in the contract. This claim strikes at the heart of the rationale behind the parol evidence rule, which recognizes that negotiations lead to written agreements whose terms cannot then be changed simply because one party claims the writing is wrong. Black's Law Dictionary (8th Ed. 2004), Parol Evidence Rule. See, also, *AmeriTrust Co. v. Murray* (1984), 20 Ohio App.3d 333, 335, 20 Ohio B. 436, 486 N.E.2d 180; *Ed Schory & Sons, Inc. v. Soc. Natl. Bank* (1996), 75 Ohio St. 3d 433, 440, 1996 Ohio 194, 662 N.E.2d 1074.

In the present case, the Fifth District placed a great deal of weight on *Wall, supra*, where the court held that a number of common law defenses do not necessarily apply to a claim under the CSPA "because the claim is based not on the contract, but on oral or other misrepresentations." However, the Fifth District either misinterpreted *Wall* or failed to recognize the important factual difference with the case at bar.

In *Wall*, the dispute was not about a specific term of the contract, such as the trade-in value, but instead, was based on a claim that the auto dealer promised to pay off an equity line of

credit owed by the consumer and used to finance her trade-in. *Id.* at 847. In *Wall*, the case turned on the fact that the purchase agreement was silent on the issue of the equity line pay off. *Id.* at 848. The Court in *Wall*, allowed parol evidence because “[the consumer was] not attempting to enforce the oral representations made by [the auto dealer] as part of [the] contract, but [was claiming that dealer’s] representations and promise to pay off her equity line of credit was a promise which enticed her to enter into the contract itself. Thus, the consumer in *Wall* was not attempting to vary or modify a specific term of the contract, but rather was attempting to hold the dealer accountable for a promise made outside the contract which in turn led the consumer to enter into the contract.

The Fifth District, in this case, held that, under its interpretation of *Wall*, the parol evidence rule was not applicable in any CSPA claim and that therefore, parol evidence could be offered, even if that parol evidence directly contradicts a specific, agreed to term of the integrated contract. This holding goes far beyond the intent of the CSPA and improperly broadens the holding in *Wall*. The Fifth District erroneously interpreted both the CSPA and *Wall* by extending the limitation on the application of the parol evidence rule, not just to missing or ambiguous terms, or oral misrepresentations, or fraud, but to the specific terms included in the integrated contract.

This is a dangerous and unprecedented disregard for the sanctity and certainty of a written contract. If allowed to stand, virtually every term of every consumer contract is subject to litigation merely on the word of the consumer.

B. Other jurisdictions do not allow parol evidence to contradict clear and unambiguous terms of a contract even when the claim is based on fraud or a consumer law.

Like Ohio, other jurisdictions have consumer protection laws to protect consumers against fraud, but none have gone so far as to absolutely exclude the application of the Parol

Evidence Rule simply because a claim is based on a consumer protection law.

In North Carolina, its Court of Appeals dealt with this issue in the purchase of a used motor vehicle in the case of *Torrance v. A, S & L Motors, LTD.*, 119 NC App.552, 459 SE 2d 67, 1995 NC App. Lexis 549. The consumer in *Torrance* claimed that during the sales process, before she signed the purchase contract, she asked the sales manager if the vehicle “had ever been wrecked” to which the sales manager answered “no”. In fact, the vehicle had been in an accident and significantly damaged. Although the contract had an “as is” clause, the trial court and Court of Appeals allowed in parol evidence as to the “misrepresentation” concerning the history of the vehicle. In doing so, however, the Court of Appeals stated:

Terms set forth in a writing intended to be the final expression of an agreement between two parties may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement. *Id* at p. 554.

The North Carolina Court went on to point out that the parol evidence offered by the consumer did not contradict the terms of the contract, but rather was offered to prove the deceptive act of the sales manager during the sales process that lead to the contract.

Had *Torrance* been decided under Ohio’s CSPA, the parol evidence, regarding the misrepresentation of the sales manager, would have also been allowed because R.C. 1345.02(B)(2) makes it a deceptive act to state that a product is of a particular standard or quality, if the statement is untrue. In Ohio, it would be for the trier of fact to determine if lying about a previously “wrecked” vehicle was an important factor regarding its quality and thus a deceptive act.

In California, the Court of Appeals for the First Appellate District in the case of *Alling v. Universal Manufacturing Corporation*, 5 Cal. App 4th 1412; 7 Cal. Rptr2d 718, 1992 Cal. App.

Lexis 572, dealt with the fraud exception to the parol evidence rule and in doing so stated at 7 Cal. Rptr, p. 734.

The law in California was stated by our Supreme Court as follows: "Our conception of the rule, which permits parol evidence of fraud to establish the invalidity of the instrument is that it must tend to **establish** some independent fact or representation, some fraud in the procurement of the instrument or some breach of confidence concerning it use, and **not a promise directly at variance with the promise of the writing**". The law in New Jersey is the same. **(Emphasis added.)**

Again, even in the context of a fraud claim, the California court recognized that parol evidence cannot be used to directly change an express term of a contract.

The cases cited by Williams in his memorandum in opposition to jurisdiction are clearly distinguishable from the case at bar and do not stand for the proposition of law that the Fifth District adopted in this case.

In *Richards v. Luxury Imports of Palm Beach, Inc.*, 877 So.2d 944, 2004 Fla.App. Lexis 11236, the Court of Appeals of Florida, Fourth District, dealt with a claim by a consumer who signed a written contract for the purchase of a used Lexus for a price of \$11,300 and gave a deposit of \$1,000. The consumer later returned and signed additional paperwork to take delivery of the Lexus without reading the paperwork completely. In the new paperwork, the purchase price was changed to \$16,000. The Court ruled that since there was a prior written contract with a significantly lower price, the consumer had a right to offer parol evidence (the prior written contract) under Florida's consumer protection laws to prove a deceptive act had occurred. No such prior "written contract" existed in this case. In *Richards*, supra, the consumer argued that he had already signed a purchase agreement and the additional documents were merely to allow him to finance the vehicle and to take delivery. The consumer in *Richards* thus claimed fraud in the inducement.

Likewise, in *Downs dba Atlas Portable Buildings v. Deaton* 864 S.W.2d 553; 1993 Tex App.Lexis 3079, the Texas Court of Appeals dealt with a consumer case where the retailer made a pre-contract and post contract representation that the roof of a portable building it sold to the consumer “would not leak”. The roof did, in fact, leak and the Court allowed in parol evidence regarding this representation as to quality and performance. The court stated, “Oral representations are not only admissible, but can serve as a basis of a DTPA action. Id at 555. The Ohio CSPA would also allow parol evidence in such a case. See R.C. 1345.02(B)(1) and R.C. 1345.02 (B)(2). That is not the claim made by Williams in this case. In this case, the “oral representation” namely the trade-in allowance amount is specifically covered in the contract.

C. The absolute prohibition against the application of the Parole Evidence Rule in CSPA cases adopted by the Fifth District is an unnecessary restriction and against public policy.

As was aptly stated by former Chief Justice Taft, in *Dice v. Akron, C. & Y. R. Co.*, 155 Ohio St. 185, 191.

“A person of ordinary mind cannot say that he was misled into signing a paper which was different from what he intended to sign when he could have known the truth by merely looking when he signed. ... If this were permitted, contracts would not be worth the paper on which they are written. If a person can read and is not prevented from reading what he signs, he alone is responsible for his omission to read what he signs.”

The proper balance of allowing parol evidence to establish fraudulent inducement claims (which are at the heart of CSPA claims) and disallowing parol evidence, was perhaps best stated in *Marion Production Credit Assn. v. Cochran* (1988) Ohio St.3d 265, where this Court held:

...the law will not countenance any and every kind of fraud allegation as capable of overcoming the Statute of Frauds. Whether the alleged misrepresentation is of a promise of future performance or of a then-present fact, it will not defeat the Statute of Frauds unless such fraudulent

inducement is premised upon matters which are *wholly extrinsic* to the writing. The Statute of Frauds may not be overcome by a fraudulent inducement claim which alleges that the inducement to sign the writing was a promise, the terms of which are directly contradicted by the signed writing. Accordingly, an oral agreement cannot be enforced in preference to a signed writing which pertains to exactly the same subject matter, yet has different terms.²

Finally, in *Aultman Hosp. Assn. v. Community Mut. Ins. Co.* (1989) 46 Ohio St.3d 51, this court stated:

Where the parties following negotiation make mutual promises which thereafter are integrated into an unambiguous contract duly executed by them, courts will not give the contract a construction other than that which the plain language of the contract provides.³

By establishing a rule that allows the defense of the Parol Evidence Rule in CSPA actions, where the parol evidence is offered solely to contradict a clear and unambiguous term of a contract, this Court can assure the sanctity of contracts in Ohio without harming consumers. Allowing the admission of parol evidence under circumstances where the terms of the contract are either ambiguous, unclear, or omitted from the contract (which has been the position of this Court and other courts in Ohio) under the CSPA, adequately protects consumers and the purpose of the CSPA.

The absolute prohibition of the Parol Evidence Rule as a defense in CSPA claims and the resulting damage to legitimate retailers trying to do business in Ohio is apparent from the outcome of this case. Williams did not complain or raise an issue regarding the \$1,000 “discrepancy” of the trade-in allowance, until two years after the contract was executed. Worse yet, Williams, knowing of this discrepancy, nevertheless walked into the dealership on two separate occasions and *paid to the dealership* an additional \$2,000 for the under estimate of the pay off owed on this same trade-in. Despite this illogical, contradictory conduct by Williams, a

2 (1988) 40 Ohio St. 3d 265, 274.

3 (1989) 46 Ohio St. 3d 51, 544 N.E.2d 920, syllabus.

jury awarded him the \$1,000 plus \$1,500 more for non-economic damages and the trial court trebled that amount and granted him another \$7,000 in legal fees. Spitzer never had the opportunity to cure this alleged \$1,000 discrepancy, even if it had wanted to, because it did not know there was an issue until the lawsuit was filed.

The actions of Spitzer in this case could not be described as fraudulent or deceptive under any reasonable interpretation of the CSPA. The actions of Spitzer are certainly not the sort of conduct that Ohio's CSPA was intended to prevent or redress.

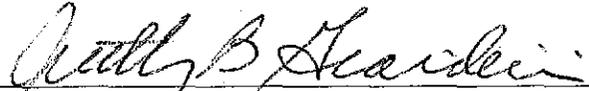
Ohio's CSPA and the rules adopted pursuant to it are designed to provide consumers with a remedy for fraud or deceptive acts of retailers. A review of the specific conduct which is legally deemed to be deceptive under the Act and its rules demonstrates that the legislature sought to provide consumers with a cause of action separate from the contracts they signed where the contracts were obtained by some fraud or subterfuge or where promises were made that were never incorporated into those contracts.

There is no benefit to Ohio's residents by allowing consumers to literally **challenge the very words** to which they signed their name. There is, in fact, a detriment to Ohio's retailers as they are forced to defend themselves against consumers who want to change the "deal" even after they agreed to it in writing. There is no satisfaction gained by retailers who win such lawsuits, since the costs in terms of time and legal fees often exceed the entire value of the contract itself. Worse, the results can be as ridiculous and unfair as the result in this case. There is no sense in having a written contract if the consumer can effectively challenge the actual written words and a judge or jury can later rewrite those words.

CONCLUSION

This Court must reverse the decision of the Fifth District Court of Appeals, not only to right the wrong committed against Spitzer, but more importantly to re-establish a reasonable and workable application of the Parol Evidence Rule so that consumers and retailers alike will have some comfort in knowing that the contract they sign is not subject to change at some later point in time. As a practical matter, this Court and other courts in Ohio (as well as those in most other states) have followed the proposition of law set forth above, it is now time to state the rule clearly and reverse the holding of the Fifth District in this case.

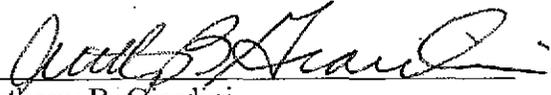
Respectfully submitted,



Anthony B. Giardini, #0006922
GIARDINI, COOK & NICOL, LLC
Attorney for Defendant-Appellant

CERTIFICATE OF SERVICE

I certify that a copy of this Merit Brief of Appellant Spitzer Autoworld Canton, LLC by ordinary U.S. mail to counsel for appellee, G. Ian Crawford, Crawford, Lowry & Assoc., 116 Cleveland Avenue NW, Suite 800, Canton, Ohio 44702 on January 15, 2009.



Anthony B. Giardini

Attorney for Defendant-Appellant

SPITZER AUTOWORLD CANTON, LLC.

APPENDIX

IN THE SUPREME COURT OF OHIO

REYNOLD WILLIAMS, JR.,)

Appellee,)

-vs-)

SPITZER AUTO WORLD CANTON)
LLC)

Appellant.)

08-1337

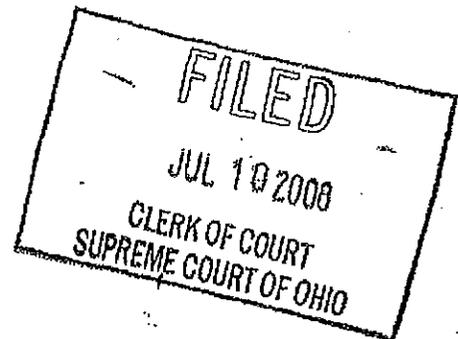
On appeal from the Stark
County Court of Appeals,
Fifth Appellate District

Court of Appeals
Case No. 07CA00187

NOTICE OF APPEAL OF APPELLANT, SPITZER AUTOWORLD CANTON, LLC.

Anthony B. Giardini (0006922)
GIARDINI, COOK & NICOL, LLC
520 Broadway, Second Floor
Lorain, OH 44052
PH: (440) 246-2665
FX: (440) 246-2670
abglaw@yahoo.com
Counsel of Record for APPELLANT
SPITZER AUTOWORLD CANTON, LLC.

G. Ian Crawford (0019243)
CRAWFORD, LOWRY & ASSOCIATES
116 Cleveland Avenue NW, Suite 800
Canton, Ohio 44702-1732
PH: (330) 452-6773
FX: (330) 452-2014
Counsel of Record for APPELLEE
REYNOLD WILLIAMS, JR.



Notice of Appeal of Appellant Spitzer Autoworld Canton, LLC.

Appellant Spitzer Autoworld Canton, LLC hereby gives notice of appeal to the Supreme Court of Ohio from the Judgment of the Stark County Court of Appeals, Fifth Appellate District, entered in the Court of Appeals case No. 2007 CA 00187 on May 27, 2008.

This case raises a substantial constitutional question and is one of public or general interest.

Respectfully submitted,

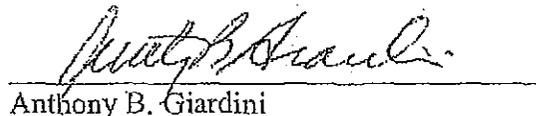
Anthony B. Giardini, Counsel of Record



COUNSEL FOR APPELLANT,
SPITZER AUTOWORLD CANTON, LLC.

Certificate of Service

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail to counsel for appellee, G. Ian Crawford, Crawford, Lowry & Assoc., 116 Cleveland Avenue NW, Suite 800, Canton, Ohio 44702 on July 10, 2008.



Anthony B. Giardini

COUNSEL FOR APPELLANT,
SPITZER AUTOWORLD CANTON, LLC.

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

NANCY S. REINHOLD
CLERK OF COURT OF APPEALS
STARK COUNTY, OHIO
05 MAY 27 PM 2:52

REYNOLD WILLIAMS, JR.

Plaintiff-Appellee

-vs-

SPITZER AUTOWORLD CANTON LLC

Defendant-Appellant

JUDGES:

Hon. William B. Hoffman, P.J.

Hon. John W. Wise, J.

Hon. Patricia A. Delaney, J.

Case No. 2007 CA 00187

OPINION

CHARACTER OF PROCEEDING:

Civil Appeal from the Court of Common
Pleas, Case No. 2006 CV 03856

JUDGMENT:

Affirmed in Part; Reversed in Part, and
Attorney Fees Awarded

(L)

DATE OF JUDGMENT ENTRY:

APPEARANCES:

For Plaintiff-Appellee

IAN CRAWFORD
CRAWFORD, LOWRY & ASSOC.
116 Cleveland Avenue NW, Suite 800
Canton, Ohio 44702-1732

For Defendant-Appellant

ANTHONY B. GIARDINI
ANTHONY B. GIARDINI CO., LPA
520 Broadway, Third Floor
Lorain, Ohio 44052

APPROPRIATE
NANCY S. REINHOLD
CLERK OF COURT OF APPEALS
STARK COUNTY, OHIO
5-27-08

Wise, J.

{¶1} Appellant Spitzer Auto World Canton LLC appeals the decision of the Stark County Court of Common Pleas, which granted a monetary judgment and attorney fees in favor of Appellee Reynold Williams, Jr. in a consumer sales practices lawsuit. The relevant facts leading to this appeal are as follows.

{¶2} Appellant is a Pontiac-GMC automobile dealership in located in Canton, Ohio. In early October 2004, Appellee Williams made a couple of visits to appellant's showroom, expressing an interest in purchasing a new sport-utility vehicle. He first looked at a 2004 GMC Yukon Denali, but decided it was out of his price range. He then turned his attention to a 2004 GMC Yukon SLT, a "demonstrator" vehicle with 4,900 miles on the odometer, being sold as a new vehicle. Appellee ultimately purchased the Yukon SLT and traded in his 2003 Ford Explorer.

{¶3} The purchase agreement, signed on October 7, 2004, contained a provision that if the true payoff balance of the loan appellee carried on his trade-in vehicle (the Ford Explorer) was more than the estimated payoff balance of \$29,000, appellee would pay the difference to appellant. It turned out that the true payoff balance on the Explorer was \$31,000; hence, appellee returned to the dealership on October 28, 2004 and December 3, 2004, conveying a \$1,000 check each time to cover the \$2,000 discrepancy.

{¶4} On October 10, 2006, appellee filed a lawsuit seeking relief under the Consumer Sales Practices Act ("CSPA"). Appellant therein alleged that appellant's agents had misrepresented the Yukon SLT as a new vehicle, had allowed \$15,500 in trade-in as opposed to a purportedly promised figure of \$16,500, had required appellee

to sign a second financing agreement with an 11% interest rate instead of 8.5%, had unlawfully assessed a \$97.50 "dealer overhead charge," and had failed to allow for or document "employee discount" pricing as requested by appellee.

{¶15} The matter proceeded to a jury trial on May 8 and 9, 2007. A directed verdict was granted on two of appellee's four claims. The jury returned a verdict in favor of appellee for \$2,500, which the court later trebled to \$7,500 under R.C. 1345.09(B). In essence, the jury found in favor of appellant on the "demonstrator vehicle" issue, but determined that appellant had committed an unfair and/or deceptive trade act by giving appellee \$1,000 less for his trade-in vehicle than had allegedly been agreed to.

{¶16} On June 29, 2007, the trial court issued judgment entries addressing all post-verdict issues, including, inter alia, awarding appellee's counsel a total of \$7,000 in attorney fees.

{¶17} Appellant filed a notice of appeal on July 3, 2007. Appellee filed a notice of cross-appeal, regarding the issue of attorney fees, on July 6, 2007.

{¶18} Appellant herein raises the following four Assignments of Error in its appeal:

{¶19} "I. THE TRIAL COURT ERRED IN DENYING DEFENDANT-APPELLANT'S MOTION FOR DIRECTED VERDICT AT THE CLOSE OF DEFENDANT'S CASE.

{¶10} "II. THE TRIAL COURT ERRED BY ALLOWING THE PLAINTIFF TO OFFER PAROL EVIDENCE WHERE THE TERMS OF THE CONTRACT WERE CLEAR, COMPLETE AND UNAMBIGUOUS WITH REGARD TO THE ISSUE FOR WHICH THE PAROL EVIDENCE WAS OFFERED.

{¶11} "III. THE TRIAL COURT ERRED IN DENYING DEFENDANT-APPELLANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT ON THE ISSUE OF LIABILITY UNDER THE CONSUMER SALES AND PRACTICES ACT AND ON THE ISSUE OF NON-ECONOMIC DAMAGES.

{¶12} "IV. THE TRIAL COURT ERRED BY ALLOWING THE JURY TO CONSIDER NON-ECONOMIC DAMAGES WHERE THE PLAINTIFF-APPELLEE FAILED TO OFFER ANY EVIDENCE OF NON-ECONOMIC DAMAGES WHATSOEVER."

{¶13} Appellee herein raises the following sole Assignment of Error on cross-appeal:

{¶14} "I. THE TRIAL COURT ERRRED (SIC) IN REDUCING THE AMOUNT OF THE 'LODESTAR' FIGURE FOR ATTORNEY'S FEES AWARDED TO APPELLEE/CROSS-APPELLANT, WHO HAD PREVAILED ON HIS CLAIMS UNDER OHIO'S CONSUMER SALES PRACTICES ACT, R.C. 1345.01 ET SEQ."

I., II., III.

{¶15} In its First Assignment of Error, appellant contends the trial court erred in denying its motion for a directed verdict. In its Second Assignment of Error, appellant argues the trial court erred in permitting the introduction of parol evidence regarding the sales transaction. In its Third Assignment of Error, appellant maintains the trial court erred in denying its motion for judgment notwithstanding the verdict. We disagree on all three counts.

{¶16} The standard of review for the grant or denial of a motion for a directed verdict is whether there is probative evidence which, if believed, would permit

reasonable minds to come to different conclusions as to the essential elements of the case, construing the evidence most strongly in favor of the non-movant. *Brown v. Guarantee Title & Trust/Arta* (Aug. 28, 1996), Fairfield App.No. 94-41, citing *Sanek v. Duracote Corp.* (1989), 43 Ohio St .3d 169, 172, 539 N.E.2d 1114. A motion for a directed verdict therefore presents a question of law, and an appellate court conducts a de novo review of the lower court's judgment. *Howell v. Dayton Power & Light Co.* (1995), 102 Ohio App.3d 6, 13, 656 N.E.2d 957, 961. Ohio appellate courts have applied a standard of review to Civ.R. 50(B), addressing the grant of a judgment notwithstanding the verdict, in essentially the same fashion as a Civ.R. 50(A) motion for a directed verdict.

{¶17} The crux of appellant's overall argument is that appellee's case was built on parol evidence, which, if excluded, would not permit reasonable minds to come to different conclusions concerning the parties' sales transaction. Specifically, appellant sets forth that the sales agreement recites "TRADE ALLOWANCE" with a bold arrow pointing to box on the document, with "\$15,500" printed inside. Plaintiff's Exhibit 23.

{¶18} Appellant's argument presupposes that the parol evidence rule is inherently recognized in CSPA cases. However, in *Wall v. Planet Ford, Inc.*, 159 Ohio App.3d 840, 825 N.E.2d 686, 2005-Ohio-1207, the Court recognized that a number of common law defenses do not apply to a claim under the CSPA "because the claim is based not on the contract, but on oral or other misrepresentations." *Id.* at ¶ 25, quoting *Doody v. Worthington*, Franklin Cty. M.C. No. M 9011CVI-37581, 1991 WL 757571, citing National Consumer Law Center, *Unfair and Deceptive Acts and Practices* (2d Ed.1988), Sections 4.2.15 and 5.2.4. "For the same reason, the statute of frauds, the

parol evidence rule, contractual limitations on liability, and contractual limitations on remedies do not apply." *Id.*

{¶19} R.C. 1345.02(A) states as follows: "No supplier shall commit an unfair or deceptive act or practice in connection with a consumer transaction. Such an unfair or deceptive act or practice by a supplier violates this section *whether it occurs before, during, or after the transaction.*" (Emphasis added). We reiterate that the CSPA "is a remedial law which is designed to compensate for traditional consumer remedies and so must be liberally construed pursuant to R.C. 1.11." *Einhorn v. Ford Motor Co.* (1990), 48 Ohio St.3d 27, 29, 548 N.E.2d 933. Likewise, the purpose of the CSPA is to protect consumers in a manner not afforded under the common law. *Elder v. Fischer* (1998), 129 Ohio App.3d 209, 214 (citations omitted).

{¶20} Because the gravamen of appellee's case is based on the aforesaid section of the CSPA, we hold the parol evidence rule does not apply under these circumstances, and that a directed verdict and judgment notwithstanding the verdict were properly denied.

{¶21} Appellant adds an argument under these assigned errors that appellee's claims should have been barred by the doctrines of laches and estoppel by waiver, because appellee did not earlier assert his "trade allowance" claim, even when he returned to the dealership two months later to pay on the shortfall pertaining to the payoff balance on his prior vehicle (see our recitation of facts, *supra*). Although the format of appellant's argument does not comply with App.R. 16(A), upon review we find no error in the trial court's rejection of any defenses of laches and estoppel by waiver in this matter.

{¶22} Accordingly, appellant's First, Second, and Third Assignments of Error are overruled.

IV.

{¶23} In its Fourth Assignment of Error, appellant contends the trial court erred in allowing the jury to consider evidence of non-economic damages. We disagree.

{¶24} Pursuant to R.C. 1345.09(B), if a supplier is found to be in certain violations of R.C. 1345.02, treble damages are awardable. See *Bird v. E-Z TV & Appliance* (March 13, 1990), Washington App.No. 89 CA 11.

{¶25} In *Whitaker v. M.T. Automotive, Inc.* (2006), 111 Ohio St.3d 177, 181, 855 N.E. 2d 825, the Ohio Supreme Court held: " *** [I]n an action brought under the CSPA, all forms of compensatory relief, including noneconomic damages, are included within the unrestricted term 'damages' under R.C. 1345.09(A)." Moreover, an appellate court will generally not consider any error which a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court. See, e.g., *Pastor v. Pastor*, Fairfield App.No. 04 CA 67, 2005-Ohio-6946, ¶ 17, citing *State v. 1981 Dodge Ram Van* (1988), 36 Ohio St.3d 168, 170, 522 N.E.2d 524. The record in this matter indicates that appellant did not submit jury interrogatories, pursuant to Civ.R. 49(B), to specifically address the issue of damages. As a result, we have no evidence before us as to how the jury calculated damages in this matter, and we must therefore presume the correctness of the jury's verdict. See *Jury v. Ridenour* (June 15, 1999), Richland App.No. 98CA100, citing *Powers v. Jayne* (March 18, 1996), Licking App. No. 95-CA-54.

{¶26} Accordingly, appellant's Fourth Assignment of Error is overruled.

Cross-Appeal

I.

{¶27} In his sole Assignment of Error on Cross-Appeal, appellee challenges the amount of attorney fees awarded to him by the trial court.

{¶28} Pursuant to R.C. 1345.09(F)(2), "[t]he court may award to the prevailing party a reasonable attorney's fee limited to the work reasonably performed, if * * * [t]he supplier has knowingly committed an act or practice that violates this chapter."

{¶29} This Court has recognized that "[a]ctions brought under R.C. Title 13 typically involve relatively small damages, yet the cost of recovering those damages may be enormous, as the offending suppliers may stoutly defend themselves * * *. Confronted with the likelihood of incurring very much more debt in attorney fees than could be recovered in damages, most consumers would never bring or continue to prosecute an action for a private remedy." *Gaskill v. Doss* (Dec. 26, 2000), Fairfield App.No. 00 CA 4, quoting *Sprovach v. Bob Ross Buick, Inc.* (1993), 90 Ohio App.3d 117, 121, 628 N.E.2d 82.

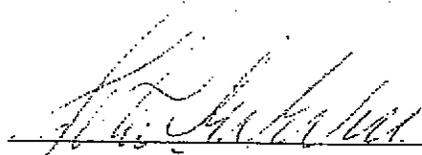
{¶30} The record supports that appellant did not question the number of hours expended on the case by appellee's counsel, nor was the reasonableness of the hourly rate called into question. Tr., June 29, 2007, at 7, 53. Nonetheless, the trial court reduced the propounded figure of \$11, 216.00 by nearly forty percent, justifying its decision by noting that fees in excess of \$7,000 would "simply be too disproportionate." While we are generally reluctant to override a trial court's discretion in addressing attorney fees, we note the Ohio Supreme Court has clearly " *** reject[ed] the

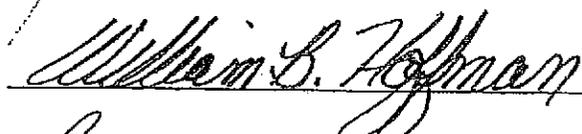
contention that the amount of attorney fees awarded pursuant to R.C. 1345.09(F) must bear a direct relationship to the dollar amount of the settlement, between the consumer and the supplier." *Bitner v. Tri-County Toyota* (1991), 58 Ohio St.3d 143, 144. Here, upon the essential stipulation to the basic hours expended and the reasonableness of the rate, the question remained of the reasonableness of expending legal resources on all of appellee's claims. However, when appellee's expert witness was questioned on this issue, he clearly testified that he found no evidence of work performed on the non-CSPA claims, and that the actual CSPA portion involved claims that were not "easily separated." Tr. at 23-24. Under these facts and circumstances, we are compelled to reject, on the grounds of abuse of discretion, the trial court's disproportionality rationale for reducing appellee's claimed attorney fees.

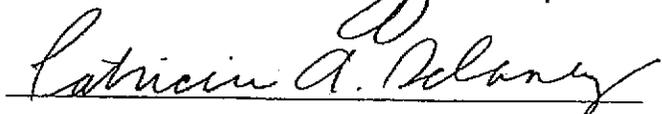
{¶31} We therefore hold appellee's sole Assignment of Error on cross-appeal is sustained on the issue of attorney fees.

{¶32} For the foregoing reasons, the judgment of the Court of Common Pleas of Stark County, Ohio, is hereby affirmed in part and reversed in part. Attorney fees in the amount of \$11,216.00 are awarded to appellee.

By: Wise, J.
Hoffman, P. J., and
Delaney, J., concur.







JUDGES

IN THE COURT OF APPEALS FOR STARK COUNTY,
FIFTH APPELLATE DISTRICT

NANCY S. REIBOLD
CLERK OF COURT OF APPEALS
STARK COUNTY, OHIO

08 OHIO
JUN 27 PM 2:52

REYNOLD WILLIAMS, JR.

Plaintiff-Appellee

-vs-

SPITZER AUTOWORLD CANTON LLD

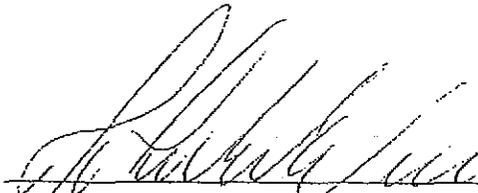
Defendant-Appellant

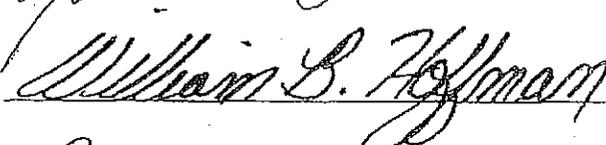
JUDGMENT ENTRY

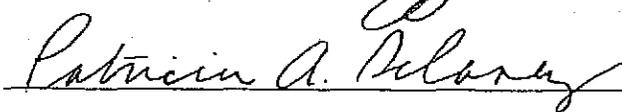
Case No. 2007 CA 00187

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio, is affirmed in part and reversed in part. Attorney fees in the amount of \$11,216.00 are hereby awarded to appellee.

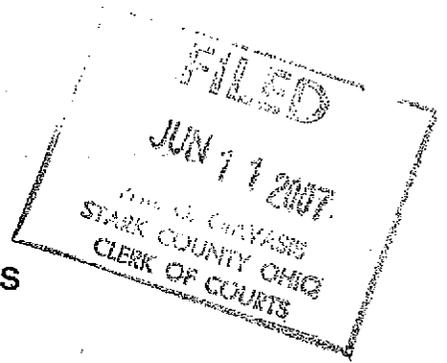
Costs assessed to appellant.







JUDGES



IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

| | | |
|----------------------------|---|-------------------------------|
| REYNOLD WILLIAMS, JR. |) | Case No. 2006CV03856 |
| |) | |
| |) | |
| |) | Judge John F. Boggins, |
| |) | Sitting By Assignment |
| Plaintiff, |) | |
| |) | JUDGMENT ENTRY: |
| vs. |) | (Overruling Defendant Spitzer |
| |) | Auto World Canton, LLC's |
| |) | Motion for Judgment |
| |) | Notwithstanding the Verdict) |
| |) | |
| SPITZER AUTO WORLD CANTON, |) | |
| LLC |) | |
| |) | |
| Defendant. |) | |

This matter came before the Court upon the motion of defendant, Spitzer Auto World Canton, LLC ("Spitzer") for judgment notwithstanding the verdict. Through its motion, Spitzer asserts that the Court should undo: (1) the Jury's general verdict of \$2,500.00 in favor of the plaintiff, Reynold Williams, Jr.; and (2) the jury's determination that Spitzer committed an unfair and/or deceptive act or practice by promising to provide an additional \$1,000.00 for the Plaintiff's trade-in, but failing to do so and/or to properly document it.

When a party asks a trial court to enter judgment notwithstanding the verdict, the trial court must apply the same standard that applies to a motion for directed verdict. *Estate of Cowling vs. Estate of Cowling* (2006), 109 Ohio St.3d 276. When the trial court considers a motion for judgment notwithstanding the

verdict, the court can consider neither the weight of the evidence, nor the credibility of witnesses. *Kellerman vs. J.S. Durig Co.* (1964), 176 Ohio St. 320. If there is substantial competent evidence to support the party against whom the motion is made, upon which evidence reasonable minds might reach different conclusions, the motion must be denied. *Hawkins vs. Ivy* (1977), 50 Ohio St.2d 114. The trial court's mere disagreement with a jury's verdict does not warrant the entry of judgment notwithstanding the verdict.

Applying the foregoing standard, the Court concludes that there was substantial competent evidence to support the party against whom the motion is made, upon which evidence reasonable minds might reach different conclusions. Accordingly, the Court finds that defendant Spitzer Auto World Canton, LLC's motion for judgment notwithstanding the verdict is not well-taken, and **OVERRULES** same.

IT IS SO ORDERED.


**HON. JOHN F. BOGGINS,
SITTING BY ASSIGNMENT**

c: G. Ian Crawford
Anthony B. Giardini

**NOTICE TO CLERK:
FINAL APPEALABLE ORDER**
IT IS HEREBY ORDERED that notice and a copy of the foregoing Judgment Entry shall be served on all parties of record within three (3) days after docketing of this Entry and the service shall be noted on the docket.


Honorable John F. Boggins, Sitting By Assignment

CHAPTER 1345: CONSUMER SALES PRACTICES

1345.01 Consumer sales practices definitions.

As used in sections 1345.01 to 1345.13 of the Revised Code:

(A) "Consumer transaction" means a sale, lease, assignment, award by chance, or other transfer of an item of goods, a service, a franchise, or an intangible, to an individual for purposes that are primarily personal, family, or household, or solicitation to supply any of these things. "Consumer transaction" does not include transactions between persons, defined in sections 4905.03 and 5725.01 of the Revised Code, and their customers, except for transactions involving a loan made pursuant to sections 1321.35 to 1321.48 of the Revised Code and transactions in connection with residential mortgages between loan officers, mortgage brokers, or nonbank mortgage lenders and their customers; transactions between certified public accountants or public accountants and their clients; transactions between attorneys, physicians, or dentists and their clients or patients; and transactions between veterinarians and their patients that pertain to medical treatment but not ancillary services.

(B) "Person" includes an individual, corporation, government, governmental subdivision or agency, business trust, estate, trust, partnership, association, cooperative, or other legal entity.

(C) "Supplier" means a seller, lessor, assignor, franchisor, or other person engaged in the business of effecting or soliciting consumer transactions, whether or not the person deals directly with the consumer. If the consumer transaction is in connection with a residential mortgage, "supplier" does not include an assignee or purchaser of the loan for value, except as otherwise provided in section 1345.091 of the Revised Code. For purposes of this division, in a consumer transaction in connection with a residential mortgage, "seller" means a loan officer, mortgage broker, or nonbank mortgage lender.

(D) "Consumer" means a person who engages in a consumer transaction with a supplier.

(E) "Knowledge" means actual awareness, but such actual awareness may be inferred where objective manifestations indicate that the individual involved acted with such awareness.

(F) "Natural gas service" means the sale of natural gas, exclusive of any distribution or ancillary service.

(G) "Public telecommunications service" means the transmission by electromagnetic or other means, other than by a telephone company as defined in section 4927.01 of the Revised Code, of signs, signals, writings, images, sounds, messages, or data originating in this state regardless of actual call routing. "Public telecommunications service" excludes a system, including its construction, maintenance, or operation, for the provision of telecommunications service, or any portion of such service, by any entity for the sole and exclusive use of that entity, its parent, a subsidiary, or an affiliated entity, and not for resale, directly or indirectly; the provision of terminal equipment used to originate telecommunications service; broadcast transmission by radio, television, or satellite broadcast stations regulated by the federal government; or cable television service.

(H) "Loan officer" has the same meaning as in section 1322.01 of the Revised Code, except that it does not include an employee of a bank, savings bank, savings and loan association, credit union, or credit union service organization organized under the laws of this state, another state, or the United States; an employee of a subsidiary of such a bank, savings bank, savings and loan association, or credit union; or an employee of an affiliate that (1) controls, is controlled by, or is under common control with, such a bank, savings bank, savings and loan association, or credit union and (2) is subject to examination, supervision, and regulation, including with respect to the affiliate's compliance with applicable consumer protection requirements, by the board of governors of the federal reserve system, the comptroller of the currency, the office of thrift supervision, the federal deposit insurance corporation, or the national credit union administration.

(I) "Residential mortgage" or "mortgage" means an obligation to pay a sum of money evidenced by a note and secured by a lien upon real property located within this state containing two or fewer residential units or on which two or fewer residential units are to be constructed and includes such an obligation on a residential condominium or cooperative unit.

(J) "Mortgage broker" has the same meaning as in section 1322.01 of the Revised Code, except that it does not include a bank, savings bank, savings and loan association, credit union, or credit union service organization organized under the laws of this state, another state, or the United States; a subsidiary of such a bank, savings bank, savings and loan association, or credit union; an affiliate that (1) controls, is controlled by, or is under common control with, such a bank, savings bank, savings and loan association, or credit union and (2) is subject to examination, supervision, and regulation, including with respect to the affiliate's compliance with applicable consumer protection requirements, by the board of governors of the federal reserve system, the comptroller of the currency, the office of thrift supervision, the federal deposit insurance corporation, or the national credit union administration; or an employee of any such entity.

(K) "Nonbank mortgage lender" means any person that engages in a consumer transaction in connection with a residential mortgage, except for a bank, savings bank, savings and loan association, credit union, or credit union service organization organized under the laws of this state, another state, or the United States; a subsidiary of such a bank, savings bank, savings and loan association, or credit union; or an affiliate that (1) controls, is controlled by, or is under common control with, such a bank, savings bank, savings and loan association, or credit union and (2) is subject to examination, supervision, and regulation, including with respect to the affiliate's compliance with applicable consumer protection requirements, by the board of governors of the federal reserve system, the comptroller of the currency, the office of thrift supervision, the federal deposit insurance corporation, or the national credit union administration.

(L) For purposes of divisions (H), (J), and (K) of this section:

(1) "Control" of another entity means ownership, control, or power to vote twenty-five per cent or more of the outstanding shares of any class of voting securities of the other entity, directly or indirectly or acting through one or more other persons.

(2) "Credit union service organization" means a CUSO as defined in 12 C.F.R. 702.2.

Effective Date: 05-17-2000; 01-01-2007; 2008 HB545 09-01-2008

1345.02 Unfair or deceptive acts or practices.

(A) No supplier shall commit an unfair or deceptive act or practice in connection with a consumer transaction. Such an unfair or deceptive act or practice by a supplier violates this section whether it occurs before, during, or after the transaction.

(B) Without limiting the scope of division (A) of this section, the act or practice of a supplier in representing any of the following is deceptive:

(1) That the subject of a consumer transaction has sponsorship, approval, performance characteristics, accessories, uses, or benefits that it does not have;

(2) That the subject of a consumer transaction is of a particular standard, quality, grade, style, prescription, or model, if it is not;

(3) That the subject of a consumer transaction is new, or unused, if it is not;

(4) That the subject of a consumer transaction is available to the consumer for a reason that does not exist;

(5) That the subject of a consumer transaction has been supplied in accordance with a previous representation, if it has not, except that the act of a supplier in furnishing similar merchandise of equal or greater value as a good faith substitute does not violate this section;

(6) That the subject of a consumer transaction will be supplied in greater quantity than the supplier intends;

(7) That replacement or repair is needed, if it is not;

(8) That a specific price advantage exists, if it does not;

(9) That the supplier has a sponsorship, approval, or affiliation that the supplier does not have;

(10) That a consumer transaction involves or does not involve a warranty, a disclaimer of warranties or other rights, remedies, or obligations if the representation is false.

(C) In construing division (A) of this section, the court shall give due consideration and great weight to federal trade commission orders, trade regulation rules and guides, and the federal courts' interpretations of subsection 45 (a)(1) of the "Federal Trade Commission Act," 38 Stat. 717 (1914), 15 U.S.C.A. 41, as amended.

(D) No supplier shall offer to a consumer or represent that a consumer will receive a rebate, discount, or other benefit as an inducement for entering into a consumer transaction in return for giving the supplier the names of prospective consumers, or otherwise helping the supplier to enter into other consumer transactions, if earning the benefit is contingent upon an event occurring after the consumer enters into the transaction.

(E)(1) No supplier, in connection with a consumer transaction involving natural gas service or public telecommunications service to a consumer in this state, shall request or

submit, or cause to be requested or submitted, a change in the consumer's provider of natural gas service or public telecommunications service, without first obtaining, or causing to be obtained, the verified consent of the consumer. For the purpose of this division and with respect to public telecommunications service only, the procedures necessary for verifying the consent of a consumer shall be those prescribed by rule by the public utilities commission for public telecommunications service under division (D) of section 4905.72 of the Revised Code. Also, for the purpose of this division, the act, omission, or failure of any officer, agent, or other individual, acting for or employed by another person, while acting within the scope of that authority or employment, is the act or failure of that other person.

(2) Consistent with the exclusion, under 47 C.F.R. 64.1100(a)(3), of commercial mobile radio service providers from the verification requirements adopted in 47 C.F.R. 64.1100, 64.1150, 64.1160, 64.1170, 64.1180, and 64.1190 by the federal communications commission, division (E)(1) of this section does not apply to a provider of commercial mobile radio service insofar as such provider is engaged in the provision of commercial mobile radio service. However, when that exclusion no longer is in effect, division (E)(1) of this section shall apply to such a provider.

(3) The attorney general may initiate criminal proceedings for a prosecution under division (C) of section 1345.99 of the Revised Code by presenting evidence of criminal violations to the prosecuting attorney of any county in which the offense may be prosecuted. If the prosecuting attorney does not prosecute the violations, or at the request of the prosecuting attorney, the attorney general may proceed in the prosecution with all the rights, privileges, and powers conferred by law on prosecuting attorneys, including the power to appear before grand juries and to interrogate witnesses before grand juries.

(F) Concerning a consumer transaction in connection with a residential mortgage, and without limiting the scope of division (A) or (B) of this section, the act of a supplier in doing either of the following is deceptive:

- (1) Knowingly failing to provide disclosures required under state and federal law;
- (2) Knowingly providing a disclosure that includes a material misrepresentation.

Effective Date: 05-17-2000; 01-01-2007