

**In The  
Supreme Court of Ohio**

**REYNOLD WILLIAMS, JR.,**

Appellee,

vs.

**SPITZER AUTOWORLD OF CANTON,  
LLC,**

Appellant.

**CASE NO.: 2008-1337**

**On Appeal from the  
Stark County Court of Appeals,  
Fifth Appellate District,  
Case No. 07CA00187**

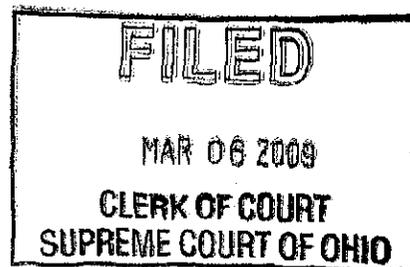
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**APPELLEE'S MERIT BRIEF**

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## INTRODUCTION

### Appellant's Proposition of Law:

**Parol evidence cannot be offered by a party in a claim brought under the Consumer Sales Practices Act to alter the term of a written contract where that term is clear and unambiguous.**

### Appellee's Proposition of Law:

**The Consumer Sales Practices Act broadly prohibits all deceptive, unfair or unconscionable acts or practices in consumer transactions. Common law contract defenses, such as the parol evidence rule, do not apply to statutory causes of action under the Consumer Sales Practice Act.**

The core issue in this case is whether Ohio's Consumer Sales Practices Act, Ohio Revised Code Section 1345.01 *et seq.* ("CSPA"), prohibits misrepresentations and other consumer fraud notwithstanding supplier attempts to exclude evidence of such fraud by application of common law contract principles, like the parol evidence rule. The determination of this issue is purely a legal one. The Court need only examine the clear language of the relevant statute and corresponding regulation in order to reject the proposition that such an exclusionary shield exists under the CSPA for suppliers like Appellant, Spitzer AutoWorld of Canton, L.L.C. ("Appellant" or "Spitzer"). The Court need not consider Appellant's fact-based arguments, which were made to and rejected by the jury. Likewise, the Court need not consider the public policy arguments of Appellant and its amici, which are instead properly within the province of the General Assembly. Selective application of common law principles through the micromanagement of the courts, such as advocated by Appellant, is unwarranted and irrelevant. This case is about enforcement of the CSPA (not contract law) and the CSPA prohibited the conduct in question. The courts below properly imposed judgment in favor of the consumer, Appellee Reynold Williams, Jr. ("Appellee" or "Williams").

Contrary to the dramatic rhetoric of Appellant and its amici, the decisions of the courts below were neither revolutionary nor unexpected. Likewise, Appellant's attempts to distinguish similar decisions from both Ohio and other jurisdictions are unpersuasive in that they fail to recognize the underlying nature of the controlling law. This case presents only the application of a long settled principle of consumer protection law – the admissibility of extrinsic or parol evidence to prove violations of Ohio's consumer protection law in consumer protection litigation. Even Appellant is forced to recognize the general validity of this point. See Appellant's Merit Brief at 10 (allowing parol evidence to establish fraudulent inducement is “at the heart of CSPA claims”, etc.). Nonetheless, Appellant asks the Court to create a new and unwarranted exception for cases where the language in the supplier's contract is “clear and unambiguous” – regardless of the nature of a supplier's underlying misconduct.

Adoption of Appellant's proposition of law would represent a wholly unprecedented and fundamental change to the manner in which Ohio's primary consumer protection law has operated for almost forty years. It would be at odds with: (a) the very language of the CSPA and corresponding regulations promulgated by the Ohio Attorney General; (b) the legislative history and strong public policy behind the CSPA; (c) established tenets of statutory construction; (d) all CSPA case precedents; and (e) the relevant facts of this case as determined by a jury.

At a fundamental level, Appellant also is disputing the propriety of O.A.C. 109:4-3-16 and, by implication, the legislative policy behind the CSPA and even the authority of the Ohio Attorney General to promulgate such a rule. While Appellee disputes the implicit contention by Spitzer that the broad scope of the CSPA has outlived its usefulness, such arguments for a change in policy are for the legislative process, not the courts. Further, the ability of the Ohio Attorney General to promulgate rules under authority of R.C. Chapter 119 in consumer

protection matters has not been seriously or directly challenged in this case or any other known to Appellee. The rule set forth in O.A.C. 109:4-3-16(B)(22) was properly applied in the courts below and the corresponding jury verdict should not be disturbed.

For all these reasons, the Court should affirm the decisions of the courts below and hold Appellant responsible for its violation of Ohio's consumer protection laws.

**A. Statement of the Case**

The case was tried to a jury beginning on May 7, 2007 in the Stark County Court of Common Pleas. After a two day trial, the jury returned a verdict in favor of the Appellee, Reynold Williams, Jr. ("Appellee" or "Williams") and against Spitzer for knowingly violating the CSPA, awarding damages in the amount of \$2,500. In accordance with R.C. 1345.09(B), the jury award was later trebled by the trial court. After a subsequent series of motions from both parties, the trial court issued four separate judgment entries disposing of all the post-verdict issues on June 29, 2007.

Appellant filed its notice of appeal with the Fifth District Court of Appeals on July 3, 2007, raising a number of assignments of error, only one of which has survived to this level. Issues arising from the cross-appeal, regarding sufficiency of the trial court's award of attorney's fees, are likewise no longer pertinent. On May 27, 2008, the Court of Appeals issued its decision and entry in favor of Appellee. *Williams v. Spitzer AutoWorld of Canton, LLC*, 2008-Ohio-2535. It is from this decision that Appellant has now appealed to this Court.

## **B. Statement of Facts**

The relevant facts as recited by the Fifth District Court of Appeals, *Williams v. Spitzer AutoWorld of Canton, LLC*, 2008-Ohio-2535, ¶¶2-4, are essentially correct. Williams agreed to purchase a vehicle from Spitzer. There was evidence of numerous questionable actions on the part of Spitzer as a part of this transaction, including a number of misrepresentations, forgery of Williams' signature on a series of documents as well as a credit application form that Spitzer had had him sign in blank.<sup>1</sup>

For reasons not relevant to this appeal, the only factually allegation at issue no wis Williams' testimony that, unbeknownst to him, at this stage of the litigation is whether, unbeknownst to Williams, Spitzer inserted into the written purchase agreement a lower value for Appellee's trade-in than the parties had orally agreed upon. (Tr. 90, 315) Despite Appellant's arguments that Williams' testimony was not credible, the jury returned a verdict in favor of Williams and against Spitzer, specifically finding Appellant had knowingly violated the CSPA and awarding damages in the amount of \$2,500.

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<sup>1</sup> See Plaintiff's Trial Exhibit 10, consisting of three pages, and Trial Exhibit 11.

## LAW AND ARGUMENT

It is uncontested that the underlying sale was a consumer transaction governed by the CSPA. The Argument section of Appellant's Merit Brief even leads off with a credible summary of the applicable law:

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.

Unfortunately, Appellant failed to apply these guiding consumer protection principles to its analysis of this case. In particular, Appellant is otherwise silent regarding the mandate of R.C. 1.11 to liberally construe the provisions of the CSPA in favor of the consumer. *Einhorn v. Ford Motor Co.* (1990) 48 Ohio St.3d, 27, 29.

### **A. The language of the CSPA allows for evidence of a supplier's oral statements.**

Since its enactment in 1972,<sup>2</sup> R.C. 1345.02(A) has declared:

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.]

R.C. 1345.02(A) is clear, unambiguous and requires no interpretation.

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<sup>2</sup> 134 Ohio Laws, Part II, 1233-1243.

This core provision of the CSPA clearly anticipates the existence of collateral oral misrepresentations inconsistent with the rights, remedies or obligations set forth in a written contract – and makes such misrepresentations unlawful *per se*. It generally contemplates the admissibility of evidence of any violations and there is no indication of the type of exception Appellant argues for here.

Other provisions of the CSPA express a similar breadth and scope. For example, R.C. 1345.03(A) strictly prohibits a supplier from committing an unconscionable act or practice in connection with a consumer transaction. Likewise, R.C. 1345.03(B) contains seven factors to consider in determining whether an act or practice is unconscionable. These factors include whether the supplier knowingly made a misleading statement of opinion upon which the consumer was likely to rely to his or her detriment (R.C. 1345.03(B)(6)) or whether the supplier knowingly took advantage of the consumer “because of the consumer's physical or mental infirmities, ignorance, illiteracy, or inability to understand the language of an agreement” (R.C. 1345.03(B)(1)). The core provisions of the CSPA anticipate the introduction of extrinsic evidence in consumer protection litigation, evidence which would potentially be subject to exclusion under the law as it existed prior to enactment of the CSPA.

Similarly, admissibility of representations by a used car dealer made to a consumer on the lot regarding the condition of the vehicle is particularly important because such statements frequently create express warranties that negate the “as is” sticker on the car or in the sales agreement. See R.C. 1302.27, 1302.28 and 1302.29.

Among other things, the broad statutory language contemplates the common situation in which: (a) a supplier makes a misrepresentation to induce a sale; (b) that such conduct represents a violation of the CSPA; and (c) that a consumer will be able to present evidence of the

misrepresentation when seeking a remedy provided by the CSPA. There are many examples where the consumer is not always provided by suppliers with an atmosphere conducive to considered review of the relevant paperwork. For example, high pressure sales tactics that interfere with a consumer's ability to understand and review the entire contract have been held violative of the CSPA. *Lardakis v. Martin*, Case No. CV94-01-0234, 1994 WL 912251 (PIF# 10001436), *Crow v. Fred Martin Motor Co.*, 2003-Ohio-1293. It is not so great a leap to imagine such tactics as the "five finger cover-up" being employed by a supplier who finishes the consumer transaction holding a signed "clear and unambiguous" contract that has no resemblance to the deal the consumer was told he was getting.

If the Appellant's proposition of law were to be adopted, the ramifications would go far beyond the typical fraudulent used car dealer case. Potentially, virtually all consumer protection cases would be affected. A wide range of supplier misconduct would become difficult if not impossible to prove in a court of law, for example, in the recent expansion of the CSPA into home lending (Am. Sub. S.B. 185, File 115 (126<sup>th</sup> General Assembly, 2006)), R.C. 1322.07 generally prohibits false or misleading statements of material fact in regard to the multitude of written agreements and other documents associated with lending. Appellant's proposition of law would permit certain acknowledged predatory lending practices to continue if there were allegedly "clear and unambiguous" contract terms, surely one of the very things the General Assembly was seeking to prohibit.

"[T]he General Assembly is not presumed to do a vain or useless thing, and ... when language is inserted in a statute, it is inserted to accomplish some definite purpose." *Celebrezze v. Hughes* (1985), 18 Ohio St.3d 71, 74 [citations omitted]. With the broad language of R.C. 1345.02(A), the General Assembly clearly intended that the CSPA provide an avenue for

aggrieved consumers to complain of **any** alleged misconduct by a supplier and, *ipso facto*, overcome defenses based on traditional contract principles -- **particularly** the parol evidence rule.

The Court should confirm that the CSPA allows for evidence of a supplier's oral statements, notwithstanding the parol evidence rule.

**B. The language of the regulations promulgated under the CSPA allows for evidence of a supplier's oral statements.**

The CSPA broadly prohibits all deceptive, unfair or unconscionable acts or practices in consumer transactions and the General Assembly also created a statutory framework for the further regulation of consumer sales practices. As a part of that framework, the legislature empowered the Attorney General to act with broad authority to administer and enforce the specific provisions and intentions of the CSPA. This Court should recognize that mandate.

Under appropriate statutory authority<sup>3</sup>, the Attorney General has promulgated O.A.C. 109:4-3-16, which defines certain deceptive practices in regard to the advertisement and sales of motor vehicles, including:

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**(B) It shall be a deceptive and unfair act or practice for a dealer, manufacturer, advertising association, or advertising group, in connection with the advertisement or sale of a motor vehicle, to:**

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**22) Fail to integrate into any written sales contract, all material statements, representations or promises, oral or written, made prior to obtaining the consumer's signature on the written contract with the dealer; [Emphasis added.]**

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<sup>3</sup> R.C. 1345.03(B)(2) and R.C. Chapter 119.

The language of O.A.C. 109:4-3-16, like the “parent” statutory provision discussed above, is clear, unambiguous and requires no interpretation. Appellant does not even overtly dispute whether this transaction falls within the governance of O.A.C. 109:4-3-16(B)(22).

O.A.C. 109:4-3-16(B)(22) clearly imposes liability upon the seller of motor vehicles for certain statements that arguably would otherwise be inadmissible in court due to the parol evidence rule. The purpose of this regulation – to ensure all material statements regarding the advertisement and sale of the vehicle are included in a final written agreement – requires introduction of evidence of oral representations not included in the agreement. Securing a consumer’s signature on an agreement in contravention of this regulation is still a CSPA violation, regardless of any “clear and unambiguous” contract terms the supplier may insert.

Like the CSPA itself, this regulation should be liberally construed in favor of the consumer. O.A.C. 109:4-3-01; *Renner v. Proctor & Gamble Co.* (1988), 54 Ohio App.3d 79, 86, 561 N.E.2d 959.

Appellant’s proposition of law also represents not only an assault on the public policies supporting the CSPA and the statutory language of the CSPA itself, but also the authority of the Ohio Attorney General to promulgate regulations to enforce the CSPA. “An administrative rule \*\*\* issued pursuant to statutory authority, has the force and effect of law unless it is unreasonable or is in clear conflict with statutory enactment governing the same subject matter.” *Youngstown Sheet & Tube Co. v. Lindley* (1988), 38 Ohio St. 3d 232, 234, 527 N.E.2d 828, quoting *Kroger Grocery & Baking Co. v. Glander* (1948), 149 Ohio St. 120, 125, 77 N.E.2d 921. Further, “courts, when interpreting statutes, must give due deference to an administrative interpretation formulated by an agency which has accumulated substantial expertise, and to

which the legislature has delegated the responsibility of implementing the legislative command." *Maitland v. Ford Motor Co.*, 103 Ohio St.3d 463 , 2004-Ohio-5717 at ¶ 26 [citations omitted].

In sum, to achieve its objectives, Appellant asks this Court to defy the legal significance of administrative rules and suspend common sense. The court of appeals properly found these arguments to be inherently flawed and affirmed the verdict against Appellant. This court should likewise affirm the Fifth District's decision

**C. The underlying public policy and the legislative history of the CSPA indicate the General Assembly anticipated a more lenient standard for proving a violation of Ohio's consumer protection laws, including abrogation of the parol evidence rule in CSPA claims.**

The General Assembly has evidenced a clear public policy in support of consumer protection. As this Court recently emphasized again:

**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. One of its purposes is to make "private enforcement of the CSPA attractive to consumers who otherwise might not be able to afford or justify the cost of prosecuting an alleged CSPA violation, which, in turn, works to discourage CSPA violations in the first place via the threat of liability for damages and attorney fees." *Parker v. I&F Insulation Co., Inc.* (2000), 89 Ohio St.3d 261, 268, 730 N.E.2d 972.

*Whitaker v. M.T. Automotive, Inc.*, 111 Ohio St.3d 177, 2006-Ohio-5481 at ¶ 11 [emphasis added]; see also *State ex rel. Celebrezze v. Hughes* (1991), 58 Ohio St.3d 273, 569 N.E.2d 1059.

"The purpose of the CSPA is to protect consumers from 'unscrupulous suppliers' **in a manner not afforded under the common law.**" *Elder v. Fischer* (1998), 129 Ohio App.3d 209

[emphasis added], appeal denied (1998), 84 Ohio St.3d 1434, 702 N.E.2d 1213, citing *State ex*

rel. *Celebrezze v. Howard* (1991), 77 Ohio App.3d 387, 393-94, 602 N.E.2d 665; see also *Wiseman v. Kirkman* (Oct. 4, 2002), 2<sup>nd</sup> Dist. No. 1575, 2002-Ohio-5384.

“Deception was the classic consumer problem” and pre-CSPA law was “of limited value to the injured consumer because of difficulties in procedure and proof.” “Fraud, Deception, and Other Abuses in Consumer Sales & Services”, Legislative Service Commission Report No. 102 (January, 1971) at 2; see also *Thomas v. Sun Furniture & Appliance Co.* (1978), 61 Ohio App. 2d 78. The clear intent of the General Assembly has been expressed in the very breadth and scope of the CSPA. It was also succinctly expressed in the purpose clause of Am. Sub. H.B. No. 681, the 1978 amendment to the CSPA:

... to prevent unfair, deceptive, and unconscionable acts and practices, to provide strong and effective remedies, both public and private, to assure that consumers will recover any damages caused by such acts and practices, and to eliminate any monetary incentives for suppliers to engage in such acts and practices.

See 137 Ohio Laws, Part II, 3219 and 3227-3228. This announcement again evidences the State’s strong public policy favoring protections for consumers. Addressing this amendment, the Court noted the CSPA was intended “to provide strong and effective remedies ... to assure that consumers will recover any damages caused by such acts and practices.” *Einhorn v. Ford Motor Co.* (1990), 48 Ohio St.3d 27, 30 [citations omitted]. As this Court has also noted: “consumer protection acts must be interpreted in a manner calculated to provide the courts with flexibility in fashioning remedies intended by the General Assembly to redress the wrong committed and reimburse the loss occasioned.” *Celebrezze v. Hughes, supra*, at 75.

Fundamentally, the parol evidence rule does not apply because the CSPA was not founded on principles of common law fraud or even codified contract law. Rather, the legislature created a separate statutory scheme governing consumer sales practices. *Johnson v.*

*Microsoft Corp.*, 106 Ohio St.3d 278, 2005-Ohio-4985 at ¶25. The General Assembly has determined that public policy in Ohio, as in the majority of other states, favors the protection of consumers and overrides traditional common law and contractual defenses. The CSPA was crafted to focus on the misconduct of the supplier, not the sophistication of the supplier's contracts. As a result, contract and common law defenses do not generally apply to CSPA claims. *Wall v. Planet Ford, Inc.*, 2005-Ohio-1207 at ¶¶25-26, appeal denied 106 Ohio St.3d 1464, 2005-Ohio-3490; *Gallagher v. WMK Inc.*, 2007-Ohio-6615 at ¶24. The act or practice is to be considered from the point of view of the consumer and is an issue of fact to be decided from all the relevant facts and circumstances in a given case. *Wall, supra* at ¶21.

Appellant and its amici have described specters of economic doom of the type which were initially raised when consumer protection laws were first proposed across the country almost four decades ago. These specters are periodically reanimated whenever an industry feels aggrieved by a ruling in favor of consumer protection. However, such phantom menaces are not going to spring spontaneously into being as a result of this case. Appellant and its amici are really arguing for a change in the underlying public policy which generated Ohio's consumer protection legislation. Such policy arguments are best suited for the attention of the legislature. "A fundamental principle of the constitutional separation of powers among the three branches of government is that the legislative branch is 'the ultimate arbiter of public policy.'" *State ex rel. Van Cleave v. School Employees Retirement System*, 120 Ohio St.3d 261, 2008-Ohio-5377 at ¶27; *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948 at ¶21 [citation omitted].

Furthermore, the General Assembly has had over thirty-five years to reconsider the wide scope of the CSPA and the language of R.C. 1345.02(A) in particular. In all those years, the

operative language of R.C. 1345.02(A) has never been amended and such long-term inaction demonstrates a legislative endorsement of the interpretation by the Attorney General and the courts that allowed consideration of supplier misconduct evidenced by oral statements by the supplier. Additionally, amendments to other provisions of R.C. 1345.02 demonstrate the continuing trend has been not to limit but to increase the scope of the CSPA. Most recently, the General Assembly broadened the coverage of the CSPA to include mortgage brokers, real estate appraisers and other actors implicated in recent malfeasances in the mortgage lending industry. Am. Sub. S.B. 185, File 115 (126<sup>th</sup> General Assembly, 2006).

“A court’s preeminent concern in construing a statute is the legislative intent in enacting a statute.” *State ex rel. Van Dyke v. Public Emp. Retirement Bd.*, 99 Ohio St.3d 430, 2003-Ohio-4123 at ¶27. To determine legislative intent, the language of the statute should be made “reading undefined words and phrases in context and construing them in accordance with the rules of grammar and common usage.” *State ex re. Pontillo v. Public Emp. Retirement Sys. Bd.*, 98 Ohio St.3d 500, 2003-Ohio-2120 at ¶41, quoting *State ex rel. Portage Lakes Edn. Assn., OEA/NEA v. State Emp. Relations Bd.*, 95 Ohio St.3d 533, 2002-Ohio-2839 at ¶36. Read in accordance with the rules of grammar and common usage, R.C. 1345.02(A) and O.A.C. 109:4-3-16(B)(22) manifestly provides for admissibility of oral misrepresentations by suppliers. Applying the parol evidence rule to any CSPA claim would require rewriting the statute. In construing a statute, a court may not add or delete words. *State v. Hughes* (1999), 86 Ohio St.3d 424, 427. “This we cannot do.” *State ex rel. Lee v. Karnes*, 103 Ohio St.3d 559, 2004-Ohio-5718 at ¶25.

The language of the CSPA, the underlying public policy and the legislative history all indicate the General Assembly anticipated a more lenient standard for proving violations of

Ohio's consumer protection laws. This statutory scheme both explicitly and implicitly abrogated the parol evidence rule, a legitimate reasons to protect and promote the public welfare..

Even if there were some ambiguity about the intent behind the CSPA in general or R.C. 1345.02(A) in particular, the CSPA is a remedial law that courts are required to liberally construe in favor of the consumer. *Einhorn v. Ford Motor Co.* (1990), 48 Ohio St.3d 27, 29. Appellant has given this principle of statutory construction only lip service because it dooms Appellant's proposition of law.

**D. Ohio's courts have consistently agreed that oral representations of suppliers are admissible in consumer transactions regarding the advertisement and sale of motor vehicles as well as other CSPA litigation, notwithstanding the parol evidence rule.**

O.A.C. 109:4-3-16(B)(22) has long since passed muster. See *Clayton v. McCary* (N.D. Ohio 1976), 426 F. Supp. 248; *Renner v. Derin Acquisition Corp.* (1996), 111 Ohio App.3d 326, appeal denied (1996), 77 Ohio St.3d 1480, 673 N.E.2d 142 (citing *Gaylan v. Dave Towell Cadillac* (1984), 15 Ohio Misc.2d 1, 473 N.E.2d 64, 66)); *Peterman v. Waite* (Nov. 10, 1980), 5<sup>th</sup> Dist. 79-CA-19, 1980 WL 131229; *Wall v. Planet Ford, Inc.*, 2005-Ohio-1207; *Williams v. American Suzuki Motor Corp*, 2008-Ohio-3123; *Burton v. Elsea, Inc.* (Dec. 27, 1999), 4<sup>th</sup> Dist. Ct. App. No. 97CA2556, 1999 WL 1285874; *Casto v. Mathews Ford-Oregon* (Feb. 2, 1996), Lucas Mun. Ct. No. 94CVF00028, 1995 WL 911529; *Price v. Humphries* (Nov. 26, 1990), New Phil. Mun. Ct. No. 7-89-CVE-243, 1990 WL 677015. As noted earlier, , the CSPA also protects consumers from unremitting sales tactics that interfere with a consumer's ability to read and understand the transactional documents. See, also, *Brown v. Silzar, Inc.*, 1981 WL 5321 (Ohio Ct. App. 2d Dist. Montgomery County 1981); *State ex rel. Celebrezze v. Consumer's Edge, Inc.*, 1990 WL 677012 (Ohio C. P. 1980). Appellant's proposition of law would actually encourage

the acts of suppliers such as those prohibited under these decisions, acts which for decades have been considered unlawful sales tactics in consumer transactions.

The Court should follow the overwhelming and consistent lead of these courts and decline to limit extrinsic evidence in CSPA litigation.

**E. Other jurisdictions agree with Ohio**

Ohio is not unique in allowing evidence of oral misrepresentations and disregarding the parol evidence rule in the arena of consumer protection litigation. See, e.g., *Downs v. Seaton* (Tex. App., 1993), 864 S.W.2d 553, 555; *Richards v. Luxury Imports of Palm Beach, Inc.*, 877 So.2d 944 (Fla. Dist. Ct. App. 2004); *Craig & Bishop v. Piles*, 2005 WL 3078860 (Ky. App. 2005), *aff'd*, 247 S.W.3d 897 (Ky. S.Ct. 2008); *Wang v. Massey Chevrolet* (2002), 97 Cal.App.4<sup>th</sup> 856, 869-70, 118 Cal.Rptr. 770. Perhaps most cogently, in *Torrance v. AS&L Motors, Ltd.* (1995), 119 N.C.App. 552, 459 S.E.2d 67, the court concluded:

Although defendant's oral statements concerning the condition of the automobile were parol evidence and inadmissible to contradict the terms of a written contract, **the evidence here was not offered to contradict the contract, but rather to prove an unfair or deceptive act.** The parol evidence rule does not bar the evidence in these situations.

*Id.* at 554-55 [citations omitted and emphasis added]. The trial court in this case properly came to the very same conclusion as the *Torrance* court and the Fifth District properly affirmed that decision.

Appellant attempts to distinguish these cases. However, these purported distinctions are fact-based and otherwise irrelevant. At best, many of Appellant's distinctions are disguised policy arguments. Under his CSPA claim, Williams was not trying to enforce the oral promises

of Appellant as a part of any written contract. Instead, Williams established that Appellant's misrepresentations amounted to unfair and deceptive practices connected to a consumer transaction in violation of the CSPA. In the final analysis, other jurisdictions acknowledge and apply the same principle that is central to resolution of this case: the evidence here was not offered to contradict the contract, but rather to prove an unfair or deceptive act.

**F. The facts of this case support the verdict rendered by the jury.**

Spitzer's underlying arguments rely heavily on its own interpretation of the facts, which summarily discounts the existence of any contrary evidence and -- more importantly -- the jury's verdict. However, it is axiomatic that judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, at the syllabus; *Gerijo, Inc. v. Fairfield* (1994), 70 Ohio St.3d 223, 226. If the evidence is susceptible of more than one interpretation, the reviewing court must construe the evidence consistently with the trial court's judgment. *Gerijo*, 70 Ohio St.3d at 226.

Appellant simply cannot accept the conclusion of the jury that it knowingly violated the CSPA. Although more skillfully disguised in its Merit Brief, Appellant still argues, as it did in the Fifth District, that the weight of the facts (as interpreted by Appellant) should have led the jury to a more palatable verdict. Appellant also now presents itself as some sort of white knight protecting the sanctity of all Ohio businesses -- despite not only the jury's unanimous verdict, but also undisputed evidence at trial of forgeries and of a prohibited consumer practice that is based on a case bearing the Spitzer name (i.e., *Gross v. Spitzer Buick Company* (Dec. 22, 1998),

Summit C.P. No. CV-97-09-4942 [PIF#10001725] (prohibiting suppliers from having consumers sign blank credit applications)).

There also was no evidence proffered at trial by Appellant to support the real thrust of Appellant's arguments – that is, the public policy of Ohio should favor suppliers over consumers for the good of the overall economy. Again, such policy issues should be addressed (if at all) by the legislature.

In light of the jury verdict in this case, Appellant is really arguing that even though its conduct was deceptive, evidence of that deception should not have been presented to the jury. Under application of Appellant's proposition of law, so long as the supplier had the right piece of paper with the consumer's signature on it, courts would be required to ignore evidence of suppliers' wrongful acts. Adoption of Appellant's proposition of law would impose an unprecedented and particularly suspect alteration to the operation of the CSPA. It would reward suppliers who are adept at deceiving consumers by providing such suppliers with an easy defense to any consumer claim, no matter how egregious the conduct.

Because questions of credibility are reserved for the trier of fact, and because the parol evidence rule only excludes evidence offered to vary the terms of a contract, the Court should uphold the trial court's decision to present to the jury the question of whether Spitzer violated the CSPA.

**G. The Parol Evidence Rule only excludes evidence offered to alter the terms of a contract.**

The parol evidence rule serves to secure the integrity of contracts, but it is neither a rule of evidence, a rule of interpretation, nor a rule of construction. *Charles A. Burton, Inc. v. Durkee* (1952), 158 Ohio St. 313, 324. It guards against a party who agrees to unambiguous terms of a

written contract and then seeks to disavow those terms through extrinsic evidence. However, application of the parol evidence rule includes many exceptions. See generally, 32A C.J.S. Evidence, § 1474 *et seq.* and § 1528 *et seq.* (2008). For example, courts across the country are usually hesitant to exclude evidence of fraud or, more specifically, claims of misrepresentation inducing a contract. *Id.*

However, as the Fifth District correctly held below, the parol evidence rule does not apply to CSPA litigation. While this Court need not engage in any greater analysis than that used by the Fifth District to resolve this appeal, it does not take any huge leap of logic to realize the practical intent behind the CSPA was to relax the rules that had allowed certain suppliers to run roughshod over hapless consumers. At a very basic level, the CSPA broadened the definition of fraud in consumer cases or, from another perspective, created the new category of easier-to-prove “consumer fraud”. In either event, fraud committed in a qualifying consumer transaction was clearly meant to become much easier for the consumer to prove. This case is a perfect example of this basic concept in operation.

## CONCLUSION

It is uncontested that the underlying sale was a consumer transaction governed by the CSPA. Clearly, the CSPA was crafted so as to allow the introduction of oral representations and promises into evidence to prove violations of Ohio's most basic consumer protection laws. Appellant does not even overtly dispute whether this transaction falls within the governance of O.A.C. 109:4-3-16(B)(22). Appellant acknowledges that extrinsic evidence can be used by consumers in CSPA litigation even in cases where a written agreement was reached. Additionally, Appellant can cite no authority interpreting the CSPA that supports its proposition of law and has no argument around the implementation of R.C. 1.11 in favor of Appellee.

Yet Appellant and its amici rather extemporaneously argue for a return to the "good old days" when defenses based on standard contract law were consistently used to prevent vulnerable consumers from seeking meaningful relief in the courts -- one of the very factors underlying the public policy which prompted enactment of the CSPA. Spitzer cannot deny that its view would immunize unscrupulous suppliers with good drafting skills and other more sophisticated violators of the CSPA -- and leave consumers unprotected in such cases. Obviously, that is not what the General Assembly intended.

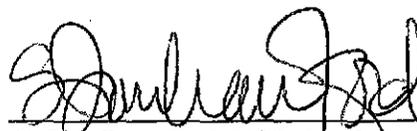
Representations made to a consumer in the course of a dealer's effort to consummate a sale, after which something different is inserted into the written contract for the consumer's signature constitute a deceptive sales practice as defined by Ohio law. A supplier who commits a deceptive sales practice is guilty of violating the CSPA. The corresponding consumer is thereby entitled to remedies. Spitzer's oral misrepresentations are not only admissible, **but form the very basis for a CSPA violation.** Any other interpretation would allow a written contract to operate as a waiver of the protections of the CSPA, contrary to the clear public policy of Ohio.

Denying Ohio's consumers an adequate avenue for relief from supplier misconduct because of a contract term undermines the entire statutory scheme. Indifference -- if not impunity -- towards the mandate of the CSPA would prevail. Application of the parole evidence to CSPA litigation, as advocated by Appellant, would be a drastic and unjustified modification of Ohio's consumer protection laws and this Court should refrain from imposing such an unwarranted or dangerous modification.

This case turned on whether the jury believed Appellee could reasonably rely on the statements made by Appellant and that those representations were unfair, deceptive or unconscionable as defined by the CSPA. The sanctity of contract law in general is not in jeopardy and any argument to modify the breadth of the public policy underlying the CSPA should be addressed by the General Assembly. Until then, the existing legislative intent and statutory language is clear.

Based upon the foregoing law and argument, this Court should AFFIRM the decision of the Fifth District, dismiss the appeal at Appellant's costs, and the matter returned to the court below for consideration of Appellee's reasonable attorney's fees associated with this appeal.

Respectfully Submitted:



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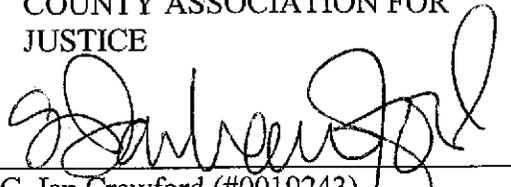
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