

No. 2014-

In the Supreme Court of Ohio

JERRY DILLON, ET AL.

14-0451

Plaintiffs-Appellees

v.

FARMERS INSURANCE OF COLUMBUS, INC.

Defendant-Appellant

ON DISCRETIONARY APPEAL FROM THE COURT OF APPEALS, FIFTH APPELLATE DISTRICT COSHOCTON COUNTY, OHIO CASE No. 2013-CA-0014

MEMORANDUM IN SUPPORT OF JURISDICTION

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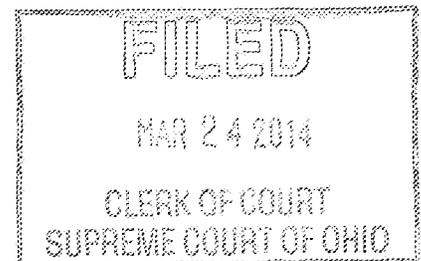


TABLE OF CONTENTS

I. EXPLANATION OF WHY THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST 1

II. STATEMENT OF THE CASE AND FACTS.....2

III. ARGUMENTS IN SUPPORT OF PROPOSITIONS OF LAW5

 Proposition of Law No. 1:.....5

 An insurer does not engage in a “consumer transaction” for the purposes of any provision of the Ohio Consumer Sales Practices Act (R.C. 1345.01 *et seq.*), when it adjusts an insured’s claim for motor vehicle damage, and issues a repair estimate. 5

 A. The Ohio Consumer Sales Practices Act was not intended to address disputes between insurers and their insureds.....5

 B. The necessary elements of a “supplier” and a “consumer transaction” pursuant to the Ohio Consumer Sales Practices Act are lacking. 8

 Proposition of Law No. 2:..... 11

 An insurer’s issuance of a repair estimate for the use of OEM and non-OEM parts is not an “unfair or deceptive act or practice” pursuant to any provision of the Ohio Consumer Sales Practices Act (R.C. 1345.01 *et seq.*), where the estimate complies with the express terms of the applicable insurance policy; the insurer orally notifies the insured of the content of the estimate; and the insured chooses the repair facility. 11

 A. R.C. 1345.81 is inapplicable if the insured does not choose the form of vehicle repair estimate to receive.....11

 B. The Dillons were never deceived, and Farmers did not commit an unfair or deceptive act or practice. 12

IV. CONCLUSION..... 14

CERTIFICATE OF SERVICE..... 14

APPENDIX “A” 15

 Opinion and Journal Entry of the Fifth District Court of Appeals,
 journalized February 6, 2014 A

I. EXPLANATION OF WHY THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST

This case involves issues of first impression concerning the purpose and scope of the Ohio Consumer Sales Practices Act (“CSPA,” R.C. 1345.01, *et seq.*) with regard to the insurers and their repair estimates for motor vehicles. Claims for automobile damage are the most common form of insurance claim filed in Ohio. There were Two Hundred Eighty-Seven Thousand Fifty (287,050) automobile accidents in Ohio in 2012, not to mention countless additional vehicle thefts and other insurance claims for damage to motor vehicles. These statistics will only continue to grow. Although the per claim value of each car insurance claim may be relatively low, the aggregate dollar value is tremendous when factoring the sheer volume of claims filed each year.

The Ohio Supreme Court’s role is not to serve as an additional court of appeals on review, but rather to clarify rules of law arising in court of appeals that are matters of “public or great general interest.” *Baughman v. State Farm Mut. Auto. Ins. Co.*, 88 Ohio St.3d 480, 2000-Ohio-397, 727 N.E.2d 1265. A matter is of public or great general interest if the citizens of Ohio “have a pecuniary interest in this case, or their rights or liberties are collectively affected.” *State v. Judd*, 8th Dist. No. 89278, 2007-Ohio-6811. Alternatively, the issue must present novel questions of law or procedure. *Manigault v. Ford Motor Co.*, 96 Ohio St.3d 431, 2002-Ohio-5057, 775 N.E.2d 824).

It is vitally important for all insurers to be provided clear and consistent guidelines and rules in issuing vehicle repair estimates for damage to their insureds’ motor vehicles. Clear and consistent standards of regulation will enable insurers to cohesively comply with all guidelines related to the issuance of vehicle repair estimates. Inconsistent and unclear standards are problematic for insurers and their policy-holders.

This case presents an ideal opportunity for the Court to address the scope and limitations of the CSPA as applied to the insurance industry. If the Fifth District Court of Appeals decision is allowed to stand, it will drastically increase the scope of the CSPA far beyond what the Legislature ever intended, and contravene the firmly-established Ohio precedent that the CSPA does not apply to any facet of insurance policy disputes. Further, R.C. 1345.81, the statute solely relied upon by the Court of Appeals, has not been addressed by any courts in any published opinions, and lacks legislative history.

The Court of Appeals decision now erroneously subjects insurers to awards of treble damages and attorney fees for the first time in the history of the CSPA. With the tremendous volume of yearly automobile insurance claims, the implications of the Court of Appeals decision will send shockwaves throughout Ohio in the form of substantially higher premiums and fewer choices for insurance for Ohio consumers and businesses. This is exactly the type of decision that can destabilize the insurance industry as a whole. It is critically important this Court provide direction as to the scope of the CSPA under the facts of this case, and similar situations in the insurance claim handling process.

II. STATEMENT OF THE CASE AND FACTS

Underlying Claim Facts

This case stems from a single-car accident in which a deer struck Plaintiffs' vehicle. Plaintiffs contacted Mission Auto Connection, Inc., a repair shop they had prior experience with, who agreed to make arrangements to tow the vehicle from the scene and provide a rental car. Farmers paid the towing charge and the Dillons' rental car expenses in full.

Mark Babb, a Farmers Special Field Claims Representative, was assigned to the insurance claim. Before Mr. Babb inspected the vehicle, he contacted Mr. Dillon to explain the

insurance coverage and claim adjustment process in detail. During this conversation, Mr. Dillon **did not** inform Mr. Babb he only wanted OEM parts used to repair his vehicle if Farmers determined the vehicle to be repairable. Original Equipment Manufacturer, or OEM parts, are new vehicle parts designed and created for use with a specific vehicle manufactured by the vehicle's maker. Non-OEM parts are aftermarket vehicle parts built in accordance with OEM standards and procedures manufactured by third-parties.

Mr. Babb inspected the vehicle at Mission Auto. During the inspection Mr. Babb created a proposed written repair estimate in accordance with the terms of the applicable insurance policy, which permitted use of both OEM and non-OEM parts to repair the vehicle. In fact, the applicable policy states as follows:

Under Part IV – Damage to Your Car, Limits of Liability, item 2 is deleted and replaced by the following:

2. ***The amount necessary to repair or replace the property or parts with other of like kind and quality, or with new property less an adjustment for physical deterioration and/or depreciation. Property of like kind and quality includes, but is not limited to, parts made for or by the vehicle manufacturer. It also includes parts from other sources such as rebuilt parts, quality recycled (used) parts and parts supplied by non-original equipment manufacturers. (Emphasis added.)***

Mission Auto was presented with this written estimate and did not object to the use of non-OEM parts. Mission Auto accepted Eight Thousand Four Hundred Sixty-Two Dollars and 25/100 (\$8,462.25) from Farmers to pay for the agreed upon repairs, and also received more than One Thousand Dollars (\$1,000.00) in additional payments from Farmers for subsequent repair work related to the accident.

Importantly, Farmers, in compliance with its consistent policies and procedures, provided the Dillons both an oral estimate, as well as a written estimate, for the vehicle repairs, to provide

knowledge to the Dillons and inform them of the repairs being performed. The Dillons **did not** at any point make any elections as to what type of estimate they wanted to receive, or ever request a specific form of estimate.

Mr. Dillon later spoke with Mr. Babb, and demanded Farmers pay for the installation of strictly OEM parts. When Mr. Babb advised Mr. Dillon the insurance policy allowed Farmers to pay for the use of OEM **and** non-OEM parts for the repairs, Mr. Dillon **unilaterally** instructed Mission Auto to proceed with repairing his vehicle fully aware of the use of non-OEM parts.

Procedural Background

Appellees filed a multi-count Complaint. The Complaint included common law causes of action as well as various causes of action alleging violations of the CSPA (R.C. 1345.01, *et seq.*) After timely answering the Complaint, Farmers filed a Motion for Judgment on the Pleadings. The basis for the Motion was that as a matter of law the CSPA did not apply to insurance claims. That Motion was denied by the trial court.

Following discovery, the parties both filed Motions for Summary Judgment. The trial court denied Farmers' Motion in its entirety and granted Plaintiffs' Partial Motion for Summary Judgment. The Dillons then voluntarily dismissed, without prejudice, all of their common law claims. The trial court *sua sponte* vacated the jury trial date, and instead ordered a damages hearing, tried to the Court.

Before the damages hearing the parties stipulated that if there was indeed a statutory violation, the Dillons' actual damages were limited to One Thousand Five Hundred Twenty-One and 07/100 Dollars (\$1,521.07). Evidence and testimony was presented at the damages hearing, and briefing was also provided to the trial court. The trial court took the matter under advisement and ultimately determined the Dillons were entitled to treble damages and entered a

judgment of damages in their favor for Four Thousand Five Hundred Sixty-Three and 21/100 Dollars (\$4,563.21). The trial court also awarded attorney fees of Twenty Thousand Five Hundred Forty Dollars (\$20,540.00) and litigation expenses of Three Thousand Nine Hundred Eighty-Nine and 38/100 Dollars (\$3,989.38).

The Dillons filed a Motion for Reconsideration, contending the trial court incorrectly calculated the amount of treble damages. That Motion was granted and the final award of damages to the Dillons, exclusive of attorney fees and costs was Six Thousand Eighty-Four and 28/100 Dollars (\$6,084.28).

Farmers timely appealed both the trial court's initial award of damages and attorney fees, and the trial court's subsequent modified award. The Court of Appeals affirmed the majority of the trial court's rulings, but reversed the award of treble damages, holding that the Dillons could not recover actual damages in addition to treble damages.

III. ARGUMENTS IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1:

An insurer does not engage in a “consumer transaction” for the purposes of any provision of the Ohio Consumer Sales Practices Act (R.C. 1345.01 *et seq.*), when it adjusts an insured’s claim for motor vehicle damage, and issues a repair estimate.

A. The Ohio Consumer Sales Practices Act was not intended to address disputes between insurers and their insureds.

Nearly every Ohio court addressing the issue has held an insured cannot bring a claim against his or her insurer under the CSPA, as a matter of law. *See, e.g., Provident Life & Accident Ins. Co. v. McCoy*, 2006 WL 5909027 (S.D.Ohio Feb. 1, 2006). Indeed, according to *Johnson v. Lincoln Natl. Life Ins. Co.*, 69 Ohio App.3d 249, 255, 590 N.E.2d 761 (1990), “[i]t is clear the Ohio Legislature meant to regulate the insurance industry in R.C. Title 39 and that the Ohio Consumer Sales Practices Act has no application to controversies over insurance policies.”

Title 39 of the Revised Code, along with Chapter 3901 of the Administrative Code, are intended to regulate the insurance industry, not the CSPA.

R.C. 1345.81 has not been addressed by any courts in any published opinions and lacks any form of legislative history. While this particular statute was enacted on October 16, 1990, Ohio courts consistently and overwhelmingly thereafter still held Title 39 is intended to regulate the insurance industry, and the CSPA was not designed to address insurance disputes.¹

For instance, in *Miller v. Geico Indemn. Co.*, 2008-Ohio-791, 2008 WL 525415, ¶17 (Feb. 28, 2008), Geico obtained a repair estimate for the damaged car at issue for Nine Thousand Three Hundred Ninety-Nine and 10/100 Dollars (\$9,399.10). Geico declared the car a total loss, based on the fair market value of the vehicle, and offered Ms. Miller Fourteen Thousand Dollars (\$14,000.00) in full resolution of the claim.

In response, Ms. Miller requested Geico repair the vehicle and not declare it a total loss. Subsequently, Ms. Miller defaulted on her car loan, and Wells Fargo repossessed the car. Despite Ms. Miller's request that the vehicle be repaired, Geico elected to declare the vehicle a total loss. Geico made payment for the total loss directly to Wells Fargo, pursuant to the terms of the policy. However, Miller still owed a deficiency to Wells Fargo.

Ms. Miller filed suit against Geico raising a CSPA claim. She alleged Geico deliberately padded its repair estimate in order to justify declaring the vehicle a total loss. She alleged it was

¹ See also *Bernard v. Natl. Union Fire Ins. Co. of Pittsburgh*, 2009 WL 2413922, *1 (N.D. Ohio Aug. 5, 2009) ("Ohio courts interpreting these statutes have routinely ruled that insurance coverage disputes are not consumer transactions recognized under the OSCPA."); *Drozeck v. Lawyers Title Ins. Corp.*, 140 Ohio App.3d 816, 749 N.E.2d 775 (2000) (granting insurer judgment on the pleadings because CSPA does not apply to claims against insurers); *Chesnut v. Progressive Cas. Ins. Co.*, 166 Ohio App.3d 299, 2006-Ohio-2080, 850 N.E.2d 751 (court dismissed CSPA claim alleging insurer should have obtained a salvage title for vehicle after declaring it a total loss); *Walker v. State Farm Mut. Auto. Ins. Co.*, 141 Ohio Misc.2d 36, 2006-Ohio-7255, 868 N.E.2d 1281 (dismissing CSPA claim stemming from insurer's act of declaring a car a total loss, but selling car with clean title instead of salvage title).

her desire to have her vehicle repaired, and that she obtained her own repair estimate for the vehicle that was less than the estimate obtained by Geico. The Eighth District Court of Appeals affirmed the trial court's grant of summary judgment in Geico's favor reasoning that insurance actions are not within the scope of the CSPA. *Id.*

Furthermore, the rules of statutory construction necessitate a finding the CSPA does not apply to insurance disputes, such as the present case. As *Burdge v. Kerasotes Showplace Theatres, L.L.C.*, 12th Dist. No. CA2006-02-023, 2006-Ohio-4560, ¶59, indicates, "courts must keep in mind that a strong presumption exists against any statutory construction that produces unreasonable or absurd consequences." R.C. 1.47(C). The court in *Burdge* construed two separate CSPA statutes, and concluded:

Finding that consumers such as appellant can collect \$200 in damages, without suffering any injury, every time they visit any merchant in Ohio who has not yet upgraded his or her electronic transaction equipment to comply with current law would lead to seemingly absurd results.

Id.

Following the decision of the Fifth District Court of Appeals produces unreasonable results. Such a finding drastically increases the scope of the CSPA, and contravenes the well-established Ohio precedent that the CSPA does not apply to any facet of insurance policy disputes, which insurers have relied upon for years. Indeed, the Ohio Legislature implemented an entire Title of the Ohio Revised Code (Title 39) to regulate such transactions separate and apart from the CSPA. Further, Mr. Dillon was orally notified of the contents of the vehicle repair estimate, and unilaterally elected to proceed with the repairs. He simply was never deceived or misled.

Moreover, the Court of Appeals decision permitted Plaintiffs' counsel to collect an absurd claim of attorney's fees in excess of Twenty Thousand Dollars (\$20,000.00) at a rate of Four Hundred Dollars (\$400.00) per hour stemming from a Municipal Court Complaint with very minimal efforts. The Dillons requested and received less than one hundred (100) pages of documents during discovery. Only two depositions were taken, which lasted a grand total of seventy-six (76) minutes. In fact, the fee award was **nine times** the amount of actual damages.

The Municipal Court erred in denying Farmers' Motion for Partial Judgment on the Pleadings and Farmers' Motion for Summary Judgment in this matter. For the same reasons, the Municipal Court erred in granting the Dillons' Motion for Summary Judgment. Even after R.C. 1345.81 was enacted on October 16, 1990, various courts continue to hold Title 39 is intended to regulate the insurance industry, and the CSPA was not designed to address insurance disputes.

B. The necessary elements of a "supplier" and a "consumer transaction" pursuant to the Ohio Consumer Sales Practices Act are lacking.

According to the CSPA, namely R.C. 1345.02(A), "[n]o supplier shall commit an unfair or deceptive act or practice in connection with a consumer transaction." A "supplier" is defined as "a seller, lessor, assignor, franchisor, or other person engaged in the business of effecting or soliciting consumer transactions." R.C. 1345.01(C). A "consumer transaction," is defined in R.C. 1345.01(A) as "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."

Moreover, R.C. 1345.81 is clear that a consumer transaction is a necessary prerequisite for any form of liability under the CSPA. *See* 1345.81(E) (stating "[a]ny violation of this section in connection with a consumer transaction a defined in section 1345.01 * * *"). Accordingly, to perfecting a CSPA claim both a "supplier" and a "consumer transaction" must be involved.

See R.C. 1345.02. Consumer transactions do not encompass transactions between persons defined in R.C. 5725.01, which includes insurance companies. See R.C. 5725.01(C). Nevertheless, the Court of Appeals decision never addresses whether Farmers is a supplier and whether a consumer transaction is present in this case.

In the present case, a consumer transaction is lacking. Recently, the Ohio Supreme Court held the CSPA does not apply to a residential mortgage servicer. In *Anderson v. Barclay's Capital Real Estate, Inc.*, 136 Ohio St.3d 31, 2013-Ohio-1933, 989 N.E.2d 997, ¶¶ 15-17, the court, in reaching this conclusion, reasoned as follows:

Moreover, transactions between mortgage-service providers and homeowners are not "consumer transactions" within the meaning of the CSPA because there is no "transfer of an item of goods, a service, a franchise, or an intangible, to an individual." A financial institution may contract with a mortgage servicer to service the loan, but the mortgage servicer does not transfer a service to the borrower, which is what would be required in order to trigger the CSPA.

The term "transfer" is not defined in the CSPA, so we must give it its plain and ordinary meaning. See State v. Anthony, 96 Ohio St.3d 173, 2002-Ohio-4008, 772 N.E.2d 1167, ¶ 11. Black's Law Dictionary defines the term to mean "[t]o sell or give." Black's Law Dictionary 1636 (9th Ed.2009).

Here, the mortgage servicer neither sells nor gives the borrower the services it provides to the owner of the mortgage and note. A mortgage servicer provides a service to a financial institution, but providing such a service to a financial institution is neither analogous to transferring a service to a borrower nor sufficient to impose liability under the CSPA.

In the present case, the CSPA is intended to apply to the auto body shop who sold and performed the repairs, not to the issues associated with the insurance contract between the Dillons and Farmers or the issuance of a vehicle repair estimate by Farmers. Farmers' dealings with the Dillons and Mission Auto were limited to the following:

1. Contacting the Dillons about their insurance coverage and the claim adjustment process;
2. Inspecting the vehicle;
3. Creating and providing the vehicle repair estimate; and
4. Issuing payments to the Dillons and Mission Auto for the authorized repair work.

Farmers did not sell the car parts, but merely created the repair estimate. Mr. Dillon also testified he unilaterally authorized Mission Auto to proceed with the vehicle repairs using strictly OEM parts. As such, Farmers did not make any solicitations to the Dillons or Mission Auto, and the Dillons cannot point to any affirmative evidence that Farmers affected or influenced the repair process.

A consumer transaction is undeniably absent here. Farmers did not “transfer” the car parts, but merely created the repair estimate to allow Mission Auto to repair the vehicle. Further, Farmers is not a “supplier.” There is no evidence Farmers affected or solicited anything from the Dillons or Mission Auto. The only business Farmers is involved in is that of providing insurance policies and benefits. Farmers was never going to perform the repairs or control whether or how the work was to be performed. Farmers’ role is contractually defined and is limited to establishing the amount owed.

R.C. 1345.81, the statute solely relied upon by the Dillons resulting in the CSPA violation found by the trial court, has not been addressed by any courts in any published opinions. Given the lack of case law on point, and total lack of legislative history of R.C. 1345.81, it is vital that the Ohio Supreme Court address and analyze R.C. 1345.81 and provide guidance to both consumers and insurers.

This case presents an ideal opportunity for the Court to address the scope and limitations of the CSPA as applied to the insurance industry. If the Fifth District Court of Appeals decision

is allowed to stand, it will drastically increase the scope of the CSPA, and contravene the well-established Ohio precedent that the CSPA does not apply to any facet of insurance policy disputes. It is vitally important this Court provide direction as to the scope of the CSPA under the facts of this case, and similar situations in the insurance claim handling process.

Proposition of Law No. 2:

An insurer's issuance of a repair estimate for the use of OEM and non-OEM parts is not an "unfair or deceptive act or practice" pursuant to any provision of the Ohio Consumer Sales Practices Act (R.C. 1345.01 *et seq.*), where the estimate complies with the express terms of the applicable insurance policy; the insurer orally notifies the insured of the content of the estimate; and the insured chooses the repair facility.

A. R.C. 1345.81 is inapplicable if the insured does not choose the form of vehicle repair estimate to receive.

The factual record here indicates Mr. Dillon **never** chose to receive either a written estimate or an oral estimate, and therefore, R.C. 1345.81 is inapplicable. Rather, as a matter of consistent internal policy and procedure, Farmers issued both an oral and a written vehicle repair estimate, to provide knowledge to the Dillons and inform them of the repairs being performed.

There is a key requirement of R.C. 1345.81 that the person requesting the repair "*chooses to receive*" either a written estimate, oral estimate, or even no estimate at all. Indeed, R.C. 1345.81(B), states:

Any insurer who provides an estimate for the repair of a motor vehicle based in whole or in part upon the use of any non-OEM aftermarket crash part in the repair of the motor vehicle and any repair facility or installer who intends to use a non-OEM aftermarket crash part in the repair of a motor vehicle shall comply with the following provisions, as applicable:

*(1) If the person requesting the repair **chooses to receive** a written estimate, the insurer, repair facility, or installer providing the estimate shall * * *.*

*(2) If the person requesting the repair **chooses to receive an oral estimate or no estimate at all, the insurer, repair facility, or installer providing the estimate or seeking the person's approval for repair work to commence shall * * *. (Emphasis added).***

The plain and unambiguous terms of R.C. 1345.81, the sole statute relied upon to find the present CSPA violation, requires that the insured chooses the form of vehicle repair estimate he or she receives **before** triggering the remainder of obligations implicated by the statute.

The record instead indicates the Dillons were actually provided both a written and an oral estimate by Farmers. Thus, the Dillons did not make any elections as to what type of estimate they wanted to receive, and as such, R.C. 1345.81 is not even implicated by the facts in this case. Nevertheless, the Court of Appeals failed to address the inner-workings of the specific statute, and failed to provide any guidance as to the application of R.C. 1345.81 for insurers to rely upon. Since R.C. 1345.81 is inapplicable to factual situations where the insured does not elect the form of vehicle repair estimate, there can be no CSPA violation or liability under the present case.

R.C. 1345.81 has not been addressed by any courts in any published opinions. Given the lack of case law on point, and total lack of legislative history of R.C. 1345.81, it is vital that the Ohio Supreme Court address and analyze R.C. 1345.81 and provide guidance to both consumers and insurers. If the Fifth District's decision stands, it will send shockwaves throughout Ohio and be utilized as a weapon by insureds to punish insurers for simply issuing vehicle repair estimates, and providing insureds knowledge concerning the scope of such vehicle repairs. This impacts not only insurers, but their customers too, consisting of Ohio consumers and businesses.

B. The Dillons were never deceived, and Farmers did not commit an unfair or deceptive act or practice.

Under the CSPA, *"no supplier shall commit an unfair or deceptive act or practice in connection with a consumer transaction."* See R.C. 1345.02(A). In Ohio, "deception is

measured from the standpoint of the consumer asserting the OCSPA claim.” *Ferron v. EchoStar Satellite, LLC*, 727 F.Supp.2d 647, 656 (S.D. Ohio 2009). “[T]he basic test is one of fairness as the act need not rise to the level of fraud, negligence or breach of contract.” *Thompson v. Jim Dixon Lincoln Mercury, Inc.*, Butler App. No. 82-11-0109 (April 27, 1983), unreported, 1983 WL 4353. Furthermore, a deceptive act “has the likelihood of inducing a state of mind in the consumer that is not in accord with the facts.” *McCullough v. Spitzer Motor Ctr.*, Cuyahoga App. No. 64465, 1994 WL 24281 (Jan. 27, 1994). Thus, a plaintiff who could not have been deceived by a defendant’s conduct cannot prevail on a CSPA claim as a matter of law. *Cicero v. Am. Satellite, Inc.*, 10th Dist. No. 10AP-638, 2011-Ohio-4918, ¶19.

In this case, there is simply no evidence Mr. Dillon was deceived when Farmers issued the repair estimate, or subsequently paid Mission Auto the amount listed in the repair estimate. Mr. Dillon testified Farmers told him that his insurance policy only provided coverage for repairs using OEM and non-OEM parts. Despite this knowledge, Mr. Dillon made the unilateral decision to authorize Mission Auto to repair the vehicle with nothing but OEM parts, with the understanding Mission Auto would refer him to an attorney to sue Farmers under the CSPA to recover the price differential. Thus, Mr. Dillon had full knowledge of Farmers’ actions and position regarding the use of non-OEM parts in his vehicle, but elected to proceed anyway.

Therefore, the Dillons’ CSPA claim against Farmers is barred as a matter of law, contrary to the findings of the Court of Appeals. This case also presents an ideal opportunity for the Court to address the scope and limitations of the requirement for an unfair or deceptive act or practice under the CSPA as applied to the insurance industry, which is an issue of first impression.

IV. CONCLUSION

This case involves matters of public and great general interest. This case presents an ideal opportunity for the Court to address the scope and limitations of the CSPA as applied to the insurance industry. The Appellants respectfully request that this Court accept jurisdiction in this case, and clarify the important issues under the CSPA at issue in this litigation, including the scope of the CSPA to the insurance claim handling process.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served this 24th day of March, 2014, via regular mail, upon the following:

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APPENDIX "A"

[Cite as *Dillon v. Farmers Ins. of Columbus, Inc.*, 2014-Ohio-431.]

COURT OF APPEALS
COSHOCTON COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JERRY DILLON AND NANCY
DILLON

Plaintiffs-Appellees

-vs-

FARMERS INSURANCE OF
COLUMBUS, INC.

Defendant-Appellant

JUDGES:

Hon. W. Scott Gwin, P.J.
Hon. Sheila G. Farmer, J.
Hon. John W. Wise, J.

Case No. 2013CA0014

OPINION

CHARACTER OF PROCEEDING:

Civil appeal from the Coshocton County
Municipal Court, Case No. CVE-1100847

JUDGMENT:

Affirmed in Part and Reversed in Part

DATE OF JUDGMENT ENTRY:

February 6, 2014

APPEARANCES:

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For Defendant-Appellant

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Gwin, P.J.

{¶1} Appellant appeals the following judgment entries of the Coshocton Municipal Court: the March 22, 2012 judgment entry denying appellant's motion for judgment on the pleadings and motion for summary judgment, the April 27, 2012 judgment entry granting appellees' partial motion for summary judgment, the June 25, 2012 judgment entry awarding appellees damages including treble damages and attorney fees, and the nunc pro tunc judgment entry of July 17, 2012 correcting the total amount of damages to include the amount of actual damages stipulated to by the parties.

Facts & Procedural History

{¶2} In October of 2011, a deer struck the 2009 Mercury Milan of appellees Jerry and Nancy Dillon. The vehicle was damaged and could not be driven. At the time of the accident, appellees were covered by an insurance policy of appellant Farmers Insurance of Columbus, Inc. Appellees contacted Mission Auto Connection, Inc. ("Mission Auto") to tow the vehicle and provide appellees with a rental car. Appellant subsequently paid the towing charge and rental car expenses of appellees pursuant to the insurance policy.

{¶3} Mark Babb ("Babb") was the claims adjuster assigned to appellees' case. Babb contacted Jerry Dillon prior to inspecting the vehicle. At that time, Jerry Dillon did not inform Babb that he wanted original equipment manufacturer ("OEM") parts used to repair his vehicle. After Babb inspected appellees' 2009 Mercury Milan, he created a proposed repair estimate for the vehicle which included OEM and non-OEM parts. Babb presented Mission Auto with the proposed repair estimate. Babb did not obtain

Jerry or Nancy Dillon's signature on the proposed repair estimate acknowledging receipt of the estimate and approving the estimate as the line entitled "Estimate Received By" is blank. Jerry Dillon spoke with Babb after Babb inspected the vehicle and informed Babb he did not want non-OEM parts utilized to repair his vehicle. Babb told Jerry Dillon his insurance policy stated that appellant was permitted to utilize OEM and non-OEM parts for vehicle repairs. Babb knew he did not obtain Jerry or Nancy Dillon's signature on the proposed repair estimate, but stated he verbally explained to Jerry Dillon that the insurance policy specifically permitted appellant to utilize non-OEM parts.

{114} An endorsement to Part IV of the insurance policy appellees had with appellant provides that when repairing damage to the insured's car, the amount covered is the "amount necessary to repair or replace the property or parts with other of like kind and quality." "Property of like kind and quality includes * * * parts from other sources such as rebuilt parts, quality recycled (used) parts and parties supplied by non-original equipment manufacturers."

{115} After speaking with Babb, Jerry Dillon instructed Mission Auto to repair his vehicle using only OEM parts. Mission Auto repaired the vehicle. Appellant paid Mission Auto \$8,462.25 to repair appellees' vehicle and an additional \$1,000 for subsequent repair work related to the accident, but did not pay the balance of the bill for the use of the OEM parts.

{116} Appellees filed a complaint on December 27, 2011 against appellant alleging common law causes of action and alleging violations of the Ohio Consumer Sales Practice Act. Appellant filed a motion for judgment on the pleadings which the trial court denied on March 22, 2012. Appellant then filed a motion for summary

judgment on all counts and appellees filed a partial motion for summary judgment, seeking summary judgment on Count IV, violation of R.C. 1345.81 of the Ohio Consumer Sales Practices Act ("CSPA") for failure to obtain appellees' signature on the bottom of its estimate approving the use of non-OEM parts. On March 22, 2012, the trial court denied appellant's motion for summary judgment. The trial court granted partial summary judgment to appellees on April 27, 2012 as to Count IV only and scheduled a damages hearing. On May 1, 2012, appellees filed a notice of voluntary dismissal of Counts I, II, III, V, VI, VII, and VIII.

{17} On May 29, 2012, the parties filed a joint stipulation stating that if appellant is found to have violated the CSPA, the parties stipulate the amount of appellees' actual economic damages is \$1,521.07. The trial court held a hearing on proof of damages as to Count IV on June 12, 2012. At the hearing, the parties again stipulated to the \$1,521.07 amount of actual damages. Erica Eversman, Esq. ("Eversman") testified on behalf of appellees in regards to attorney fees. She testified that the particular section of the CSPA in Count IV is a complicated area of the law that only a few attorneys in the state handle. Further, that she had reviewed the bill submitted by counsel for appellees and the charges were reasonable. Eversman testified that \$400 per hour was a reasonable hourly rate for counsel for appellees given the nature of the case. Appellant did not present any evidence or testimony with regards to attorney fees. Counsel for appellant argued the bill submitted by appellees' counsel was excessive because it was more than four times the amount of appellees' possible recovery. Counsel for appellant further contended that counsel for appellees billed excessively for tasks such as research.

{¶8} The trial court entered a judgment on June 25, 2012, finding appellees were entitled to treble damages of \$4,563.21, attorney fees of \$20,540.00 and expenses of \$3,989.38. The trial court also stated that the parties stipulated to actual damages of \$1,521.07. However, the trial court failed to include the amount of actual damages in the overall award of \$29,092.59. The trial court specifically found the amount of time spent by counsel for appellees was reasonable based on the nature and complexity of the case and that \$400 per hour was a reasonable hourly rate based upon the evidence and testimony submitted by appellees. After appellees filed a motion for reconsideration, the trial court filed a nunc pro tunc judgment entry on July 17, 2012. The trial court corrected the total amount of damages to \$30,613.66, which included \$1,521.07, the amount of actual damages stipulated to by the parties.

{¶9} Appellant appeals the March 22, 2012, April 27, 2012, June 25, 2012, and July 17, 2012 judgment entries of the Coshocton Municipal Court, assigning the following as error:

{¶10} "I. THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS AND THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, AND IN GRANTING THE PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT.

{¶11} "II. THE TRIAL COURT ERRED IN AWARDING ATTORNEY FEES TO THE PLAINTIFFS, AS WELL AS IN DETERMINING THE AMOUNT OF ATTORNEY FEES.

{¶12} "III. THE TRIAL COURT ERRED IN AWARDING PLAINTIFFS TREBLE DAMAGES, AND EVEN IF AN AWARD OF TREBLE DAMAGES WAS WARRANTED, THERE WAS ERROR IN CALCULATING THE AMOUNT OF TREBLE DAMAGES."

I.

Summary Judgment Standard

{¶13} Civ.R. 56 states, in pertinent part:

"Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed mostly strongly in the party's favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

{¶14} A trial court should not enter a summary judgment if it appears a material fact is genuinely disputed, nor if, construing the allegations most favorably towards the non-moving party, reasonable minds could draw different conclusions from the

undisputed facts. *Hounshell v. Am. States Ins. Co.*, 67 Ohio St.2d 427, 424 N.E.2d 311 (1981). The court may not resolve any ambiguities in the evidence presented. *Inland Refuse Transfer Co. v. Browning-Ferris Inds. of Ohio, Inc.*, 15 Ohio St.3d 321, 474 N.E.2d 271 (1984). A fact is material if it affects the outcome of the case under the applicable substantive law. *Russell v. Interim Personnel, Inc.*, 135 Ohio App.3d 301, 733 N.E.2d 1186 (6th Dist. 1999).

{¶15} When reviewing a trial court's decision to grant summary judgment, an appellate court applies the same standard used by the trial court. *Smiddy v. The Wedding Party, Inc.*, 30 Ohio St.3d 35, 506 N.E.2d 212 (1987). This means we review the matter de novo. *Doe v. Shaffer*, 90 Ohio St.3d 388, 2000-Ohio-186, 738 N.E.2d 1243.

Motion for Judgment on the Pleadings Standard

{¶16} A motion for judgment on the pleadings presents only questions of law. *Luthy v. Dover*, 5th Dist. No. 2011AP030011, 2011-Ohio-4604, citing *Dearth v. Stanley*, 2nd Dist. No. 22180, 2008-Ohio-487. In ruling on a motion for judgment on the pleadings, the trial court must construe the material allegations in the complaint and any reasonable inferences drawn therefrom in favor of the plaintiff. If it finds plaintiff can prove no set of facts entitling plaintiff to relief, the court must sustain a motion for judgment on the pleadings. *Boske v. Massillon City School Dist.*, 5th Dist. No. 2010-CA-00120, 2011-Ohio-580, citing *Hester v. Dwivedi*, 89 Ohio St.3d 575, 2000-Ohio-230, 733 N.E.2d 1161. However, the complaint must allege sufficient facts to support any conclusions, and unsupported conclusions are not presumed to be true. *Id.*

{¶17} Judgment on the pleadings may be granted where no material factual issue exists. However, it is axiomatic that a motion for judgment on the pleadings is restricted solely to the allegations contained in those pleadings. *Giesberger v. Alliance Police Dept.*, 5th Dist. No. 2011 CA 00070, 2011-Ohio-5940, citing *Flanagan v. Williams*, 87 Ohio App.3d 768, 623 N.E.2d 185 (4th Dist. 1993).

{¶18} Our review of the trial court's decision on a judgment on the pleadings is de novo. See *State v. Sunfronko*, 105 Ohio App.3d 504, 644 N.E.2d 596 (4th Dist. 1995). When reviewing a matter de novo, this Court does not give deference to the trial court's decision. *Eagle v. Fred Martin Motor Co.*, 157 Ohio App.3d 150, 809 N.E.2d 1161, 2004-Ohio-829. "Under Civ.R. 12(C), dismissal is appropriate where a court (1) construes the material allegations in the complaint, with all reasonable inferences to be drawn therefrom, in favor of the nonmoving party as true, and (2) finds beyond doubt, that the plaintiff could prove no set of facts in support of his claim that would entitle him to relief." *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565, 570, 664 N.E.2d 931 (1996).

Count IV – CSPA Claim

{¶19} Appellant argues the trial court erred in granting appellees' partial motion for summary judgment and denying appellant's motion for judgment on the pleadings and motion for summary judgment because the CSPA does not apply to claims made by an insured under a policy of insurance. Appellant contends that insurance companies are not "suppliers" pursuant to R.C. 1345.02(A) and that consumer transactions do not include transactions between persons defined in R.C. 5725.01, including insurance companies.

{¶20} R.C. 1345.02 provides that “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.” R.C. 1345.02(A). The phrase “consumer transaction” expressly excludes transactions between persons defined in R.C. 5725.01, including “insurance companies,” defined as “every corporation, association, and society engaged in the business of insurance of any character, or engaged in the business of entering into contracts substantially amounting to insurance of any character.” R.C. 5725.01(C). Further, Ohio courts have held that an insured cannot make a CSPA claim against an insurer for a violation under the policy of insurance. *Johnson v. Lincoln Nat’l Ins. Co.*, 69 Ohio App.3d 249, 590 N.E.2d 761 (2nd Dist. 1990); *Bernard v. Nat’l Union Fire Ins. Co. of Pittsburgh, PA*, N.D. Ohio No. 5:09 CV 1523, 2009 WL 2413922 (August 5, 2009); *Chestnut v. Progressive Cas. Ins. Co.*, 116 Ohio App.3d 299, 2006-Ohio-2080, 850 N.E.2d 751; *Miller v. Geico Indemnity Co.*, 8th Dist. Cuyahoga No. 89603, 2008-Ohio-791.

{¶21} However, in this case, both appellant and appellees agree that the insurance policy, in an endorsement to Part IV, specifically allows for non-OEM parts to be used in repairing damage to the covered vehicle. Thus, despite appellant’s argument to the contrary, the issue in this case is not whether non-OEM parts are permitted under the insurance policy. Rather, the case focuses on a violation of a specific section of the CSPA, R.C. 1345.81. R.C. 1345.81(B) provides as follows:

Any insurer who provides an estimate for repair of a motor vehicle based in whole or in part upon the use of any non-OEM

aftermarket crash part in the repair of the motor vehicle and any repair facility or installer who intends to use a non-OEM aftermarket crash part in the repair of a motor vehicle shall comply with the following provisions, as applicable:

(1) If the person requesting the repair chooses to receive a written estimate, the insurer, repair facility, or installer providing the estimate shall identify, clearly in the written estimate, each non-OEM aftermarket crash part and shall contain a written notice with the following language in ten-point or larger type: "This estimate has been prepared based upon the use of one or more aftermarket crash parts supplied by a source other than the manufacturer* * *." Receipt and approval of the written estimate shall be acknowledged by the signature of the person requesting the repair at the bottom of the written estimate.

R.C. 1345.81(B)(1). R.C. 1345.81(A) provides that, as used in Section 1345.81, insurer "means any individual serving as an agent or authorized representative of an insurance company, involved with the coverage for repair of the motor vehicle in question." R.C. 1345.81(A)(5). Appellant first argues R.C. 1345.81 only applies to the repair or body shop completing the repairs. However, the statute specifically applies to "the insurer, repair facility, or installer providing the estimate."

{¶22} Appellant also contends that R.C. 1345.81 refers to R.C. 1345.01 and since insurance companies are specifically excluded from the definition of "consumer transaction," and are not "suppliers," insurance companies are not liable under R.C.

1345.81. R.C. 1345.81(E) provides that, “any violation of this section in connection with a consumer transaction as defined in section 1345.01 of the Revised Code is an unfair and deceptive act or practice as defined by section 1345.02 of the Revised Code.” Thus, while R.C. 1345.81 specifically defines and includes “insurer” in its provisions, the statute simultaneously makes reference to R.C. 1345.01, which excludes insurance companies from the definition of “consumer transaction.”

{¶23} “It is a well-settled rule of statutory interpretation that statutory provisions be construed together and the Revised Code be read as an interrelated body of law.” *Summerville v. City of Forest Park*, 128 Ohio St.3d 221, 2010-Ohio-6280, 943 N.E.2d 522 (2010). Pursuant to R.C. 1.51, “[i]f a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is to that the general provision prevail.” R.C. 1.51. R.C. 1.52(A) provides, “if statutes enacted at the same time or different sessions of the legislature are irreconcilable, the statute latest in date of enactment prevails.” R.C. 1.52(A).

{¶24} R.C. 1345.01 and R.C. 1345.02 conflict with R.C. 1345.81 with respect to their application to insurers and cannot be applied so as to give effect to all of the provisions. Accordingly, we must resort to statutory interpretation and “construe the statutes so as to give effect to the legislature’s intent.” *Summerville*, 128 Ohio St.3d at 226. A specific statute will prevail unless the general statute can be shown to be the later adoption of the two and the intent of the General Assembly was to have the general provision control. *Id.* at 228. R.C. 1345.01 and R.C. 1345.02 are part of the

general laws that form the CSPA, while R.C. 1345.81 is a specific provision enacted at a later time as an amendment to the CSPA. R.C. 1345.81 is both the more recent and the more specific statutory provision and thus, any irreconcilable conflict in the wording of the general provisions and R.C. 1345.81 must be resolved in favor of R.C. 1345.81. See *Id.* at 228; see also *Burdge v. Kerasotes Showplace Theatres, LLC*, 12th Dist. No. CA2006-02-023, 2006 WL 2535762 (finding the more specific and later-enacted statute R.C. 1345.18 prevails over the general provisions of R.C. 1345.01 and 1345.09). This statutory interpretation is consistent with the holding by the Ohio Supreme Court that the CSPA “has a remedial purpose and must accordingly be liberally construed in favor of consumers.” *Einhorn v. Ford Motor Co.*, 48 Ohio St.3d 27, 548 N.E.2d 933 (1990).

{¶25} We further note that the cases cited by appellant in support of its position that R.C. 1345.81 does not apply to insurers are distinguishable from this case as they do not deal with the specific section of the CSPA at issue in this case, R.C. 1345.81. In addition, the *Johnson* case cited by appellant and cited to by the other courts in dismissing CSPA claims against insurers, is not determinative of the issue in this case because the *Johnson* case was decided on August 31, 1990, prior to the enactment of R.C. 1345.81 on October 16, 1990. *Johnson v. Lincoln Nat'l Ins. Co.*, 69 Ohio App.3d 249, 590 N.E.2d 761 (2nd Dist. 1990).

{¶26} In this case, Babb meets the definition of “insurer” in R.C. 1345.81 as he is the individual serving as the agent or authorized representative of the insurance company involved with the coverage for repair of the motor vehicle in question. Babb provided a written estimate for the repair of appellees’ vehicle which included non-OEM parts. While the use of non-OEM parts is permissible under the insurance policy,

pursuant to R.C. 1345.81, appellant must have appellees sign the written estimate to acknowledge they received the estimate that included the notification regarding the non-OEM parts. Babb admitted he failed to obtain appellees' signature on the bottom of the repair estimate that included the notice about the non-OEM parts. This is evidenced by the repair estimate, attached as an exhibit to appellees' complaint and motion for summary judgment, in which the line entitled "Estimate Received By" is blank. Accordingly, the trial court did not err in granting appellees' motion for partial summary judgment, denying appellant's motion for summary judgment, and denying appellant's motion for judgment on the pleadings. Appellant's first assignment of error is overruled.

II.

{¶27} Appellant argues that since the CSPA does not apply to claims between an insurer and an insured, any award of attorney fees by the trial court is improper. Further, that the trial court abused its discretion in awarding fees far greater than the damages recovered. We disagree.

{¶28} An award of attorney fees is within the sound discretion of the trial court. *Rand v. Rand*, 18 Ohio St.3d 356, 369, 481 N.E.2d 609 (1985). In order to find an abuse of discretion, we must determine that the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 450 N.E.2d 1140 (1983).

{¶29} As discussed above, R.C. 1345.81, included in the CSPA, applies to any insurer who provides an estimate for the repair of a motor vehicle. R.C. 1345.09(F)(2) provides, in relevant part, that a trial court may award reasonable attorney fees to the prevailing party if "[t]he supplier has knowingly committed an act or practice that violates

this chapter [the Consumer Sales Practices Act].” A supplier does not have to know that his conduct violates the CSPA for the court to grant reasonable attorney fees. *Snider v. Conley's Service*, 5th Dist. No. 1999CA00153, 2000 WL 873780 (June 12, 2000), citing *Einhorn v. Ford Motor Co.*, 48 Ohio St.3d 27, 30, 548 N.E.2d 933 (1990). The supplier must intentionally commit the act, but need not know the act violates Ohio law. *Smith v. Hall*, 5th Dist. Stark No. 2005-CA-00124, 2005-Ohio-5789, citing *Einhorn*, 48 Ohio St.3d at 30. In this case, Babb knew the estimate contained non-OEM parts and stated he knew he did not obtain appellees’ signature on the written repair estimate that included non-OEM parts. Accordingly, appellees are entitled to reasonable attorney fees pursuant to R.C. 1345.09(F)(2).

{¶30} Appellant next contends the amount of attorney fees awarded by the trial court was not reasonable because the amount of attorney fees is grossly disproportionate to the limited dollar amount of damages in this case. However, this contention was rejected by the Ohio Supreme Court in *Bittner v. Tri-County Toyota*, 58 Ohio St.3d 143, 569 N.E.2d 464 (1991). The Ohio Supreme Court held that rather than forcing a direct relationship between the attorney fees and the amount the consumer recovers, the starting point for the determination of a reasonable amount of fees is the number of hours spent by the attorney multiplied by a reasonably hourly rate. *Id.* “This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer’s services.” *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 1939 (1983).

{¶31} The fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates. *Canton v. Irwin*,

5th Dist. No. 2011CA00029, 2012-Ohio-344. To establish the number of hours reasonably expended, the party requesting the fees should submit evidence to support the hours worked. *Hensley*, 461 U.S. at 433. A reasonable hourly rate is “the prevailing market rate in the relevant community.” *Blum v. Stenson*, 465 U.S. 886, 895, 104 S.Ct. 1541, 79 L.Ed. 2d 891 (1984). Once the trial court calculates the “lodestar figure,” it can modify the calculation by applying the factors listed in Rule 1.5 of the Ohio Rules of Professional Conduct (formerly DR 2-106(B)). *Landmark Disposal Ltd. v. Byler Flea Market*, 5th Dist. Stark No. 2005CA00294, 2006-Ohio-3935. These factors are: the time and labor involved in maintaining the litigation; the novelty and difficulty of the questions involved; the professional skill required to perform the necessary legal services; the attorney’s inability to accept other cases; the fee customarily charged; the amount involved and the results obtained; any necessary time limitations; the nature and length of the attorney/client relationship; the experience, reputation, and ability of the attorney; and whether the fee is fixed or contingent. *Canton v. Irwin*, 5th Dist. No. 2011CA00029, 2012-Ohio-344. “All factors may not be applicable in all cases and the trial court has the discretion to determine which factors to apply, and in what manner that application will affect the initial calculation.” *Id.*, citing *Bittner v. Tri-County Toyota*, 58 Ohio St.3d 143, 569 N.E.2d 464 (1991).

{¶32} In this case, at the evidentiary hearing on attorney fees, appellees submitted Exhibit A, a copy of the fee contract between Jerry Dillon and his attorney, and Exhibit B, a statement of appellees’ attorney fees. Eversman testified that the particular section of the CSPA in Count IV is a complicated area of the law that only a few attorneys in the state handle. Further, that she reviewed Exhibit B and the charges

were reasonable. Eversman stated \$400 per hour was a reasonable hourly rate for counsel for appellees given the nature of the case and that she charges \$350 per hour for similar types of cases. Appellant failed to present any evidence or testimony to refute Eversman's testimony. The trial court found the amount of time spent by counsel was reasonable based on the nature and complexity of the case and that \$400 per hour was a reasonable hourly rate based upon the evidence and testimony submitted by appellees. We agree. The evidence and testimony submitted by appellees supported the hours worked and the reasonable hourly rate requested. Appellant did not furnish the trial court with any evidence or testimony to contradict the evidence presented by appellees regarding the number of hours worked or the reasonable hourly rate. Appellant's second assignment of error is overruled.

III.

{¶33} Appellant argues the trial court erred in awarding appellees treble damages, or, in the alternative, erred in awarding appellees actual damages in addition to treble damages. We disagree in part and agree in part.

{¶34} Appellant contends the trial court erred in awarding treble damages because the practice was not declared to be deceptive or unconscionable by a regulation promulgated by the Attorney General or previously determined by an Ohio court to violated R.C. 1345.02 whose decision was available for public inspection as required by R.C. 1345.09(B). However, pursuant to R.C. 1345.81, the failure to obtain the signature and acknowledgment of the person requesting the repair in a repair estimate that includes non-OEM parts is a deceptive act, as R.C. 1345.81(E) provides that "any violation of this section in connection with a consumer transaction * * * is an

unfair and deceptive act or practice as defined by section 1345.02 of the Revised Code.” Because this definite language is included in R.C. 1345.81(E), the statute is analogous to the ten actions or practices contained in R.C. 1345.02 that are specifically found to be unfair or deceptive acts. R.C. 1345.02(B)(1) – (10). See *Mason v. Mercedes-Benz USA, LLC*, 8th Dist. No. 85031, 2005-Ohio-4296.

{¶35} In this case, the statute itself declares that the specific act at issue is an unfair or deceptive practice under R.C. 1345.02. The statute was established prior to the time appellant committed the act. Therefore, because the specific act at issue in this case has previously been declared a deceptive act, the trial court did not err in awarding treble damages in this case.

{¶36} Appellant finally asserts the trial court erred in the amount of damages awarded to appellees because appellees cannot recover actual damages in addition to treble damages. We agree. As stated by the Sixth District in *The Estate of Lamont Cattano v. High Touch Homes, Inc.*, 6th Dist. Erie No. E-01-022, 2002-Ohio-2631, R.C. 1349.09(A) and R.C. 1349.09(B) are mutually exclusive and:

a consumer can elect between the remedies of rescission or damages and, if the consumer can prove that the supplier should have known that his actions constituted a violation of the Act, the consumer can elect between rescission and damages equal to three times his actual damages up to \$200. This holding is supported by the dicta in *Stultz v. Artistic Polls, Inc.* (Oct. 10, 2001), Summit App. No. 20189, at 8, citing *Armstrong v. Kittinger* (Sept. 21, 1994), Summit

App. No. 16124 and 16378, at 26-27, where the court stated that R.C. 1345.09 provides that the consumer, who proves that a supplier has violated the Act and meets the prerequisites for treble damages under R.C. 1345.09(B), can elect either rescission of the contract or treble damages, not actual damages versus treble damages. See, also, *Mid-American Acceptance Co. v. Lightle* (1989), 63 Ohio App.3d 590, 597, 579 N.E.2d 721. Therefore, we conclude that the court may not award a party actual damages and treble damages.

Id. Accordingly, pursuant to R.C. 1345.09(B), the proper award for damages would be to calculate the actual damages multiplied by three, or \$4,563.21, because the parties stipulated to the \$1,521.07 amount of actual damages. Accordingly, appellant's third assignment of error is overruled in part and sustained in part.

{¶137} Based on the foregoing, we overrule appellant's assignments of errors I and II. We partially overrule and partially sustain appellant's assignment of error III. The March 22, 2012, April 27, 2012, and June 25, 2012 judgment entries of the Coshocton Municipal Court are affirmed. The July 17, 2012 judgment entry of the Coshocton Municipal Court is reversed in part and affirmed in part.

{¶38} Pursuant to App.R. 12(B) we hereby modify the judgment entered by the Coshocton Municipal Court and enter judgment in favor of appellees for treble damages of \$4,563.21, attorney fees of \$20,540.00 and expenses of \$3,989.38, for a total amount of \$29,092.59.

By Gwin, P.J.,

Farmer, J., and

Wise, J., concur