ORIGINAL

In the Supreme Court of Ohio

CASE NO. 2014-_____

14-0451

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

JERRY DILLON, et al.,
Plaintiffs-Appellees,

vs.

FARMERS INSURANCE OF COLUMBUS, INC.,
Defendant-Appellant.

BRIEF OF AMICUS CURIAE, OHIO ASSOCIATION OF CIVIL TRIAL ATTORNEYS, URGING ACCEPTANCE OF MEMORANDUM IN SUPPORT OF JURISDICTION OF DEFENDANT-APPELLANT, FARMERS INSURANCE OF COLUMBUS, INC.

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I. STATEMENT OF WHY CASE IS OF PUBLIC OR GREAT GENERAL INTEREST

The Ohio Association of Civil Trial Attorneys (OACTA) urges this Court to accept jurisdiction over this matter. This case presents the Court with the opportunity to address in its infancy what threatens to become a damaging precedent that may impact the insurance industry in Ohio, along with millions of insureds across Ohio.

This case merits a comparison to *Scott–Pontzer v. Liberty Mut. Fire Ins. Co.*, 85 Ohio St.3d 660 (1999) and its progeny, given the potential wide-reaching affects that may spring from this matter and cause unintended damage to Ohio's insurance industry. The General Assembly acted in 2001 to legislatively supersede *Scott-Pontzer*, noting as follows in its detailed fiscal analysis upon the introduction of the bill:

> Following the *Scott-Pontzer v. Liberty Mutual Insurance Company* Ohio Supreme Court decision, there are insurance companies that have decided not to underwrite uninsured/underinsured motorist policies in Ohio, and companies who stay are increasing their premiums. The bill states that the intent of the General Assembly in enacting this bill is to protect and preserve stable markets and reasonable rates for automobile insurance for Ohio consumers.

124 S.B. 97 (as introduced)(Detailed Fiscal Analysis)

Four years after *Scott-Pontzer* was decided, and after much confusion among Ohio's courts, this Court resolved the matter by strictly limiting the application of *Scott-Pontzer*, and overruling its progeny, *Ezawa v. Yasuda Fire & Marine Ins. Co. of Am.*, 86 Ohio St.3d 557 (1999). *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216 (2003). The *Galatis* Court noted the "numerous conflicts emanating from the lower courts" in Ohio, and concluded that *Scott-Pontzer* had "muddied the waters of insurance coverage litigation." *Galatis*, 100 Ohio St.3d at 228. All the while, insureds had seen their premiums rise, and some insurers had pulled out of Ohio altogether, limiting the choices insureds had in choosing their insurance companies.

The case at bar has the potential to cause the same kind of problems in Ohio for insurers and their insureds. The municipal court, followed by the Fifth Appellate District, has now held for the first time that the Ohio Consumer Sales Practices Act (CSPA) applies to an insurance claim. This is contrary to what other courts in Ohio have held with respect to the CSPA's application in the context of insurance contracts and transactions. See, e.g., *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"); *Provident Life & Accident Ins. Co. v. McCoy*, 2006 WL 5909027 (S.D.Ohio Feb. 1, 2006); *Bernard v. Natl. Union Fire Ins. Co. of Pittsburgh*, 2009 WL 2413922, *1 (N.D.Ohio Aug. 5, 2009); *Drozeck v. Lawyers Title Ins. Corp.*, 140 Ohio App.3d 816, 749 N.E.2d 775 (2000); *Chesnut v. Progressive Cas. Ins. Co.*, 166 Ohio App.3d 299, 2006-Ohio-2080, 850 N.E.2d 751; *Walker v. State Farm Mut. Auto. Ins. Co.*, 141 Ohio Misc.2d 36, 2006-Ohio-7255, 868 N.E.2d 1281.

As such, insurers doing business in Ohio have understood since the CSPA was enacted in Ohio that insurance claims are not subject to the CSPA. This has been the law in Ohio as interpreted by courts throughout Ohio, until now. With the Fifth Appellate District's decision in this case, the door is now opened for insurers to be sued under the CSPA, which subjects insurers to potential treble damages and attorney fees.

This case is a good example of what can happen in this new frontier of CSPA litigation against insurers. Here, an insured had a dispute with his insurer over Original Manufacturer Equipment (OEM) used in repairs done to his automobile. The parties stipulated that the insureds' actual damages were $1,521.07. When this insurance dispute became a CSPA claim, the insured was awarded treble damages in the amount of $4,563.21, litigation expenses in the

amount of $3,989.38, and attorney fees in the amount of $20,540.00. Thus, an insurance dispute that had a value of **$1,521.07** was transformed into a CSPA claim with a value of **$29,092.59**, nearly ***twenty times*** the value of the insured's actual damages in this dispute.[1]

Defendant-Appellant points out in its Memorandum in Support of Jurisdiction that there were 287,050 automobile accidents in Ohio in 2012, and automobile damage claims are the most common form of insurance claim filed in Ohio. It does not take much of a leap in logic to realize that if an insurer's exposure in such claims has the potential to dramatically increase, shockwaves will be felt throughout Ohio, and insureds will ultimately pay the price in higher premiums, or possibly be presented with fewer choices when looking for insurers, in the event some insurers conclude such potential exposure makes it too costly to do business in Ohio.

Ohio need not wade into the waters of uncertainty again with respect to the insurance industry. Insureds do not need the protections of the CSPA in this arena. The insurance industry is adequately regulated by Title 39 of the Ohio Revised Code, in conjunction with Chapter 3901 of the Ohio Administrative Code. The General Assembly recognized this as well, as insurance companies are expressly excluded from the definition of "consumer transactions." O.R.C. §1345.01(A)(expressly stating "'consumer transaction' does not include transactions between persons, defined in ... [section] 5725.01 of the Revised Code and their customers," and O.R.C. §5725.01(C), (D), and (F) specifically includes insurance companies formed or doing business in Ohio).

The section of the CSPA that the Fifth District found to be applicable in this case was O.R.C. §1345.81, and that section specifically only applies to "consumer transactions." O.R.C.

[1] The actual value of Mr. Dillon's claim was approximately $10,000. His automobile was damaged when he struck a deer. Mr. Dillon's dispute with Farmers was over the use of OEM parts in the repair, which was expressly permitted by the insurance contract. Mr. Dillon decided to have the repair done with solely OEM parts, which is where the $1,521.07 damages claim comes into play. The CSPA litigation in this case turned a $10,000 claim into a $40,000 claim.

§1345.81(E). As such, O.R.C. §1345.81 on its face does not apply to this case, because by definition, the insurance dispute between Mr. Dillon and Farmers was not a "consumer transaction."

The municipal court, and then the Fifth District, have turned a simple case of contract interpretation into a CSPA claim, and have awarded the insured almost twenty times the amount of his actual damages, and four times the amount of the actual value of his claim. This is the kind of precedent that can destabilize Ohio's insurance industry in very much the same manner as the *Scott-Pontzer* decision did fifteen years ago. This Court can seize this early opportunity to address this matter in its infancy, and provide Ohio courts, as well as insurers and their insureds, clarity and clarification as to the scope of the CSPA. OACTA urges the Court to accept jurisdiction over this appeal.

II. STATEMENT OF THE CASE

OACTA incorporates by reference the Statement of the Case included in Defendant-Appellant's memorandum. For the purposes of this amicus brief, OACTA highlights the following facts.

Farmers' dealings with the Dillons and the repair shop that did the work on the Dillons' car, 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 the vehicle repair estimate; and
4. Issuing payments to the Dillons and Mission Auto for the authorized repair work.

As such, Farmers did not sell the car parts, but merely created the repair estimate. There was no evidence introduced at the trial court level that Farmers in any way affected or influenced

the repair process. 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.

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 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.

There was no dispute that Mr. Dillon did not inform Farmers' adjuster that he only wanted OEM parts used in the repair. Mr. Dillon only later told Mission Auto to use OEM parts, which resulted in the $1,521.07 difference between Farmers' estimate and the actual work done by Mission Auto, using OEM parts.

As such, under these facts, the only real issue should have been whether Mr. Dillon had a contract claim against Farmers, and why Mr. Dillon apparently had failed to read his insurance

contract with Farmers that permitted the adjuster to make an estimate based upon the use of non-OEM parts. It is axiomatic that an insured has a duty to examine the coverage provided and is charged with knowledge of the contents of the policy. *Kincaid v. Erie Ins. Co.*, 128 Ohio St.3d 322, 944 N.E.2d 207 (2010). Mr. Dillon, of course, was free to have Mission Auto use only OEM parts, but the question was whether Farmers should be made to pay for it under the terms of the insurance contract.

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.

The Fifth District relied upon O.R.C. §1345.81 in its decision, but that statute specifically limits its own application as follows:

> (E) 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.

O.R.C. §1345.81(E)(emphasis added).

O.R.C. §1345.01(A) expressly states that a "consumer transaction" ***does not include*** "transactions between persons, defined in ... [section] 5725.01 of the Revised Code and their customers." O.R.C. §5725.01(C), (D), and (F) specifically lists in its definitions any insurance companies formed or doing business in Ohio. Thus, there is no ambiguity or conflict in this statutory scheme. On its very face, the CSPA does not apply to insurance companies in transactions with their insureds.

The lower court in this case found that O.R.C. §1345.81 is in conflict with O.R.C.

§1345.01 and O.R.C. §1345.02, and as such, the court relied upon O.R.C. §1.52(A) to give effect to O.R.C. §1345.81. *Dillon v. Farmers Ins. of Columbus*, Coshocton App. 2013CA0014, 2014-Ohio-43, at ¶24. However, this reasoning is in error because, at most, O.R.C. §1345.81 is internally inconsistent. There is no conflict between O.R.C. §1345.81 and the general statutory scheme of the CSPA.

O.R.C. §1345.81(E) ties O.R.C. §1345.81 in with the overall statutory scheme of the CSPA, requiring there to be a "consumer transaction" in order for O.R.C. §1345.81 to be applicable. This is not a conflict with the statutory framework set forth in O.R.C. §1345.01 and O.R.C. §1345.02. This is, in fact, how the CSPA was intended to operate, providing protections for consumers who are engaging in "consumer transactions" as defined by the CSPA.

The question, therefore, is not whether O.R.C. §1345.81 is in conflict with O.R.C. §1345.01 or O.R.C. §1345.02, but rather, the question is whether O.R.C. §1345.81 is in conflict with itself. At the outset, OACTA notes that the lower courts may not have even had to reach this question, as the factual record does not appear to indicate that the Dillons ***chose*** to receive either a written estimate or an oral estimate. This is a key requirement of O.R.C. §1345.81 in that the person requesting the repair "chooses" to receive either a written estimate or an oral estimate, or even no estimate at all. O.R.C. §1345.81(B)(1) and (B)(2). OACTA knows of no evidence in the record to establish that the Dillons chose one option over the other. The record instead indicates that the Dillons were actually provided both a written and an oral estimate by Farmers, and that Farmers did actually comply with the requirements of O.R.C. §1345.81(B)(2) with the oral discussions concerning non-OEM parts in the estimate. Thus, the Dillons did not make any elections as to what type of estimate they wanted to receive, and as such, O.R.C. §1345.81(B)(1) is not even implicated by the facts in this case.

In any event, the question of whether O.R.C. §1345.81 is internally inconsistent requires analysis of the language of O.R.C. §1345.81. Paragraph (A) of the statute sets forth definitions, and as the Fifth District noted, includes "insurer" in the definitions. Paragraphs (B) and (C) of the statute deal with how the use of non-OEM parts must be disclosed. Paragraph (D) of the statute specifically permits the use of non-OEM parts, provided that certain requirements are met. Paragraph (E) of the statute states that any violation of the statute "in connection with a consumer transaction" is an unfair and deceptive act or practice, and specifically references the general statutory scheme of O.R.C. §1345.01 and O.R.C. §1345.02.

As the Fifth District reasoned, O.R.C. §1.51 directs that "if a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both." Here, effect can be given to both the general statutory scheme of the CSPA and O.R.C. §1345.81 in that O.R.C. §1345.81(E) limits potential damages recoverable under the statute, which is to say, only treble damages and attorney fees can be awarded if O.R.C. §1345.81 is violated in the course of a consumer transaction as defined by the CSPA. If a violation of O.R.C. §1345.81 is not in connection with a "consumer transaction," the consumer may still elect to rescind the agreement under O.R.C. §1345.09(A), or seek a declaratory judgment, injunction, or other relief under O.R.C. §1345.09(D). Thus, all parts of O.R.C. §1345.81 may be harmonized, and there is no internal conflict.

On the other hand, if it is found that O.R.C. §1345.81 is internally inconsistent, then it should not be enforced against Farmers in this matter. This Court has held that civil statutes are unconstitutionally vague if the statute is "so vague and indefinite as really to be no rule [or standard] at all or if it is substantially incomprehensible." *Buckley v. Wilkins*, 105 Ohio St.3d 350, 353-54 (2005). While it appears that O.R.C. §1345.81 is not internally inconsistent, if the

lower court found an inconsistency, it should not have construed it against Farmers. The court simply should have not enforced it.

In any event, the facts of this case demonstrate that Farmers was simply adjusting a claim, and not engaging in a "consumer transaction" as defined by the CSPA. The lower courts here erred in applying O.R.C. §1345.81 to Farmers' claim-handling, and further erred in awarding treble damages and attorney fees.

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.

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.

The facts of this case show no deceptive act on the part of Farmers. Farmers merely adjusted a claim according to the terms of the insurance contract with the Dillons. Not only was clearly spelled out in the insurance contract, Mr. Dillon was also told about the use of non-OEM parts at the time of the inspection and estimate by the adjuster. Armed with this knowledge, Mr. Dillon unilaterally elected to proceed with the repairs using only OEM parts, with the intention of later suing Farmers to try to recover the difference in price. Mr. Dillon did not even give Farmers the chance to evaluate the Dillons' request with respect to the OEM parts. Mr. Dillon just gave the order to Mission Auto, intending to use this as a set up for a lawsuit against Farmers.

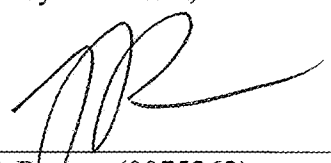
There is no dispute over what Farmers actually did here. Farmers adjusted a claim based upon the terms and conditions of the insurance contract. Even if O.R.C. §1345.81 did somehow apply to Farmers (which it clearly does not, pursuant to O.R.C. §1345.81(E)), it remains to be seen how Farmers' adjuster can comply with the terms of the insurance contract, and still subject Farmers to exposure for a CSPA claim. There is no question that the CSPA does not apply to the Dillons' procurement of insurance with Farmers. The insurance contract itself, therefore, is not subject to a CSPA claim. Farmers' adjuster created the estimate pursuant to the terms of the insurance contract. The question becomes this—how can Farmers comply with its insurance contract, which is not subject to the CSPA, but still be found to have violated the CSPA? The answer is found in O.R.C. §1345.81(E), but also should be found in the facts of this case as well. Farmers did not commit a deceptive act in its dealings with the Dillons, and there should be no viable CSPA claim against Farmers here.

IV. CONCLUSION

For the foregoing reasons, OACTA respectfully requests that this honorable Court accept

this matter for review.

Respectfully submitted,



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Proof of Service

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