

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.

**MEMORANDUM OF PLAINTIFFS-APPELLEES, JERRY DILLON, ET AL.,
IN RESPONSE TO MEMORANDUM IN SUPPORT OF JURISDICTION OF
DEFENDANT-APPELLANT, FARMERS INSURANCE OF COLUMBUS, INC.**

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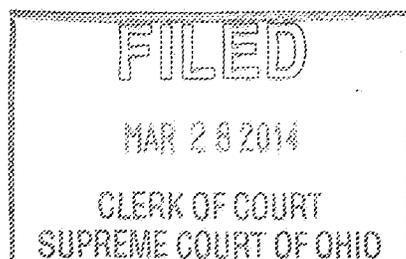
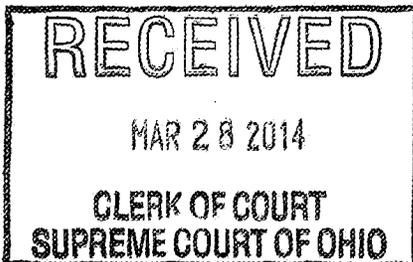


TABLE OF CONTENTS

Table of Authoritiesiii

I. STATEMENT OF WHY CASE IS NOT OF PUBLIC OR GREAT
GENERAL INTEREST1

II. STATEMENT OF THE CASE.....2

III. ARGUMENT IN SUPPORT OF APPELLEE’S POSITION.....2

IV. CONCLUSION.....4

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>Chestnut v. Progressive Cas. Ins. Co.</i> , 166 Ohio App.3d 299 dissenting opinion	3
<i>Group Life & Health Insurance Co., et al. v. Royal Drug Co., et al.</i> , 440 U.S. 205; 995 Ct. 1067; 1979 U.S. Lexis 29.....	2,3
Legislative Notes on the Enactment of ORC §1345.81.....	1
<i>Mason v. Mercedes-Benz USA, LLC</i> , 8 th Dist. No. 85031, 2005-Ohio-4296	4
<i>Scott-Pontzer v. Liberty Mutual Ins. Co.</i> , 85 Ohio St.3d 660 (1999).....	1
<i>Summerville v. City of Forest Park</i> , 128 Ohio St.3d 221, 228	3
<i>Thornton v. State Farm Mut. Auto Ins. Co.</i> , F. Supp.2d 2006 U.S. Dist. Lexis 83968 (N.D. Ohio Nov. 17, 2006)	3

Statutes

ORC §1345.81	1,3
ORC §1345.01 and 02.....	3,4
ORC §1345.81(E)	3,4
ORC § 1345.02(B)(1) – (10).....	3,4

I. STATEMENT OF WHY THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST.

The Ohio Legislature created ORC §1345.81 and specifically included insurance companies within that section. This was done to force the insurance companies to actually discuss with their insureds the use of aftermarket parts. (Legislative notes on the enactment of ORC §1345.81) The legislature envisioned that by adopting ORC §1345.81 and requiring insurance companies to have their insureds actually sign and approve their estimates, they would generate the discussion they wanted over aftermarket parts. However, up to this point, insurance companies have ignored ORC §1345.81. This case will hopefully change the way insurance companies handle repair estimates but the idea that it will create shockwaves throughout Ohio as Appellant suggests is sheer hyperbole. What it will create is some actual face to face discussion between the adjuster and the insured and the requirement that the insured sign the repair estimate. In fact, the adjusters could even mail their estimates out as they commonly do now, but simply wait to receive them back with a signature, before closing their claim. While Appellant and the Civil Trial Association make it sound as if this case will create a massive change in the insurance industry, all it will really do is force the insurance companies to get their estimates signed.

Both Appellant and the Trial Attorneys Association attempt to make this Court believe that suddenly all of the CSPA will now be available to strike at the heels of the insurance industry. This is like yelling fire at the movies. The reality is that the insurance industry has their exemption from the CSPA in ORC §1345.01 and .02 and this case will not change that. ORC §1345.81 is the only section the legislature chose to specifically include insurers within. Thus, it will remain the only section they may be sued under. This case will not destabilize Ohio's insurance industry, nor will it hurt the industry like *Scott-Pontzer* as the Trial Attorneys Association suggests. In fact, it will benefit the industry and all of the citizens of Ohio as the adjusters will now explain aftermarket parts, what they are and why they are being used, and get the signature of a much more informed and happier consumer.

Therefore, this case will not overrun the insurance industry with lawsuits. In fact, the insurance industry won't feel any economic effects from this case at all. It won't be subjected to the entire CSPA and it certainly won't be destabilized. The only result will be the insurance companies will now communicate with their insureds, which is exactly what the legislature

intended when they created ORC §1345.81. What you will end up with is a happier and more informed consumer which will only make the insurance industry stronger.

II. STATEMENT OF THE CASE

Jerry Dillon wrecked his car and turned in a claim to his insurance company, Farmers. Farmers prepared an estimate to repair Dillon's car using non-OEM aftermarket parts and failed to get Dillon's signature on said estimate. Farmers did not explain what aftermarket parts were, why they were going to use them or give Dillon an opportunity to discuss why he wanted OEM parts. Dillon had his car repaired using OEM parts and Farmers refused to pay for the difference between their estimate and the actual bill.

This case was filed in Coshocton Municipal Court. Summary judgment was granted on Plaintiffs' fourth cause of action. The parties stipulated that Plaintiff had actual damages in the amount of \$1,521.07 which was the amount of the unpaid repair bill. A damages hearing was held where the Trial Court ordered treble damages of \$4,563.21, actual damages of \$1,521.07 and legal fees and expenses of \$24,529.38.

Defendant appealed and the Fifth District upheld the decision as to the treble damages and legal fees and expenses but overturned the inclusion of the actual damages of \$1,521.07. The Court found Plaintiffs could not be awarded treble damages and actual damages together. Defendants have now appealed that decision to this Court.

III. ARGUMENT IN SUPPORT OF APPELLEE'S POSITION

1. An insurance company can most certainly engage in a consumer transaction.

According to the United States Supreme Court in *Group Life & Health Insurance Co., et al. v. Royal Drug Co., et al.*, 440 U.S. 205; 995 Ct. 1067; 1979 U.S. Lexis 29, the business of insurance must meet **all** of the following three elements: 1) have the effect of transferring or spreading policyholder risk; 2) be an integral part of policy relationship between insurer and insured; and 3) be limited to entities within the insurance industry. The issuance of a repair estimate by an insurance company does not meet any of the three criteria. It doesn't spread the policyholders risk, it simply limits the policy issuer's (the insurance company) liability. It has little or nothing to do with the policy relationship between insurer and insured. If it were an

integral part of that relationship, then why did the insurance companies operate for a hundred years without them? For years they would have their customers go and get three estimates and just chose the cheapest one. Lately they have decided to issue their own estimates so they can control how low the “lowest one” will be. So while issuing a repair estimate may be an important cost savings tool, it is not an integral part of a policy relationship. Finally, the issuance of repair estimates is not limited to entities within the insurance industry. Repair estimates are the business of auto repair not insurance. Therefore, Farmers’ issuance of a repair estimate is not part of the business of insurance and when Farmers stops acting as an insurance company, they lose their exemption from the CSPA. Group Life & Health Insurance Co., et al. v. Royal Drug Co., et al., 440 U.S. 205; 995 Ct. 1067; 1979 U.S. Lexis 29, Thorton v. State Farm Mut. Auto Ins. Co., F. Supp.2d 2006 U.S. Dist. Lexis 83968 (N.D. Ohio Nov. 17, 2006), Chestnut v. Progressive Cas. Ins. Co., 166 Ohio App.3d 299 dissenting opinion.

Appellant and the Trial Attorneys Association argue that ORC §1345.81 is not inconsistent with 1345.01 and .02 but is inconsistent with itself. 1345.01 and .02 say insurance companies are exempt from the CSPA. 1345.81 specifically includes insurance companies. They are clearly inconsistent with each other. ORC §1345.81 is not inconsistent with itself. It states that the parties must be involved in a consumer transaction for there to be a violation. It does not limit the phrase “consumer transaction” to just insurance companies as Appellant argues. It states that insurance companies, as well as **repair facilities or installers** (emphasis added) must be involved in a consumer transaction. The intent of the use of the phrase “consumer transaction” was to protect the consumer when they were actually getting their vehicle repaired. The legislature did not want actions brought in situations where the consumer contemplated a repair, got an estimate, but did not actually get the repair. Hence the inclusion of the requirement that the estimate be provided in a consumer transaction.

Once you determine 1345.81 to be in conflict with 1345.01 and .02 and not itself, you apply statutory interpretation and the specific trumps the general and the latter trumps the former. Summerville v. City of Forest Park, 128 Ohio St.3d 221, 228.

2. An insurer’s issuance of a repair estimate that calls for the use of non-OEM aftermarket crash parts is an unfair or deceptive act or practice when the insurer fails to get the signature of the person requesting the repair.

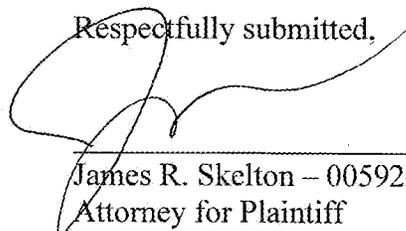
Pursuant to ORC §1345.81, the failure to obtain the signature and acknowledgment of the person requesting the repair in a repair estimate that includes non-OEM parts is a deceptive act, as ORC §1345.81(E) provides that “any violation of this section in connection with a consumer transaction is an unfair and deceptive act or practice as defined by Section 1345.02 of the Ohio 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.

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, the actions of Appellant were unfair or deceptive.

IV. CONCLUSION

Based upon the above, Appellee respectfully requests this Honorable Court refuse to accept this matter for revision.

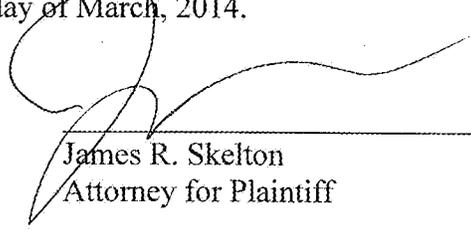
Respectfully submitted,



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PROOF OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Brief was served upon Thomas F. Glassman, Attorney for Defendant-Appellant, at 600 Vine Street, Suite 2600, Cincinnati, Ohio 45202 and upon Jamey T. Pregon, Attorney for Amicus Curiae, Ohio, Association of Civil Trial Attorneys, at 5335 Far Hills, Suite 123, Dayton, Ohio 45429, by regular U.S. mail, postage prepaid, this 26th day of March, 2014.



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