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№ 2014-0451

In the Supreme Court of Ohio

FARMERS INSURANCE OF COLUMBUS, INC.,
Defendant-Appellant

v.

JERRY DILLON, et al.,
Plaintiffs-Appellees

On Discretionary Appeal from the
Court of Appeals, Fifth Appellate District
Coshocton County, Ohio
Case *No.* 2013-CA-0014

MERIT BRIEF OF APPELLANT

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I. STATEMENT OF FACTS

Claim Background

This case involves a single-car accident during which a deer struck Plaintiffs' vehicle. Mr. and Mrs. Dillon contacted Mission Auto Connection, Inc., a repair shop they had prior experience with, which agreed to make arrangements to tow the vehicle from the scene and provide a rental car. (R. 22, p. 19; R. 24, p. 12). Farmers paid the towing charge and the Dillons' rental car expenses in full. *Id.* Mr. Dillon acknowledged Farmers permitted him to take the vehicle "anywhere [he wanted] to get it repaired." (R. 22, p. 27).

Mark Babb, a Farmers Special Field Claims Representative, was assigned to the claim. (R. 20, ¶ 3). Before Mr. Babb inspected the vehicle, he contacted Mr. Dillon to explain the insurance coverage and claim adjustment process in detail. (*Id.* at ¶ 5; R. 24, p. 16). 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. (R. 20, ¶ 6; R. 24, p. 16).

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, but manufactured by third-parties. Mr. Dillon was well-aware of the differences between those types of parts. (R. 22, p. 24).

Mr. Babb inspected the vehicle at Mission Auto. (R. 20, ¶ 8; R. 24, p. 12). During the inspection Mr. Babb created a proposed written repair estimate in accordance with the terms of the applicable insurance policy, which factored in the use of both OEM and non-OEM parts to repair the vehicle. (*Id.* at pp. 12-18).

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.).

(R. 20, Exhibit 1, p. 10). Mr. Dillon admitted he was aware of these pertinent policy terms and conditions. (R. 22, p. 44).

Mission Auto was presented with this written estimate and did not object to the use of non-OEM parts. (R. 20, ¶ 8; R. 22, p. 39). 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. (R. 20, ¶¶ 11-12).

Importantly, Farmers, in compliance with its policies and procedures, provided the Dillons both an oral estimate, as well as a written estimate, for the vehicle repairs. (R. 20, ¶¶ 5, 9; R. 22, pp. 16-17, 46). 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. (R. 24, p. 18). Further, during a conversation with Mr. Babb, Mr. Dillon did in fact state that he was having Mission Auto proceed forward with the repairs using non-OEM parts. (R. 24, p. 17).

Mr. Dillon later spoke with Mr. Babb, and changed his mind, without explanation, demanding Farmers pay for the installation of purely OEM parts. (R. 20, ¶¶ 9-10; R. 24, p. 17). Mr. Babb again advised Mr. Dillon the insurance policy allowed Farmers to pay for the use of

both OEM **and** non-OEM parts for the repairs. *Id.* Mr. Dillon **unilaterally** instructed Mission Auto to proceed with repairing his vehicle using solely OEM parts. (R. 20, ¶ 10; R. 22, pp. 28, 30, 32, 34; R. 24, pp. 3-9). Mr. Dillon was then informed he would be responsible for the difference in the cost of using strictly OEM parts. (R. 22, pp. 34, 39-40).

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 Ohio Consumer Sales Practices Act ("CSPA"). *See* 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.

After 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 solely 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 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 total award to Plaintiffs was **nearly 20 times** the actual economic damages associated with the case, despite the fact discovery was limited and not contentious.

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 treble damages to the Dillons, exclusive of attorney fees and costs, was increased to Six Thousand Eighty-Four and 28/100 Dollars ($6,084.28), for a total of Thirty Thousand Six Hundred Thirteen and 66/100 Dollars ($30,613.66).

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 calculation of treble damages, holding that the Dillons could not recover actual damages in addition to treble damages.

Reversible Error

The Court of Appeals' decision presents clear errors of law, and must be reversed. If allowed to stand, it will drastically increase the scope of the CSPA, and contravene the firmly-established Ohio precedent that the CSPA does not apply to insurance claims. **Nearly every** Ohio court addressing the issue has held an insured cannot bring a claim against his or her insurer under the CSPA. Ohio courts have consistently held Title 39 of the Revised Code is intended to regulate the insurance industry, not the CSPA.

The mandatory elements of a "supplier" and a "consumer transaction" under the CSPA are not present here. Nevertheless, the Court of Appeals' decision **never addressed** whether Farmers is a supplier, and whether a consumer transaction is present.

The Dillons were actually provided both a written and an oral estimate by Farmers. The Dillons did not make any elections as to what type of estimate they wanted to receive, and therefore, the specific statute relied upon by the Court of Appeals, R.C. §1345.81, is not even implicated by the facts in this case.

Additionally, Mr. Dillon was never actually deceived, confused, or misled by Farmers. He selected his own personal repair shop. He was notified of the contents of the written vehicle repair estimate on multiple occasions, and unilaterally decided to proceed with the repairs using only OEM parts. He admitted he was well-aware of the differences between OEM and non-OEM parts, and knew the policy provisions in dispute.

At no point in time did Mr. Babb or Farmers ever control how or if the vehicle was going to be repaired, but rather simply set the price of the estimate. The Dillons, like other insureds do, could just as easily chosen not to repair the vehicle, and kept the insurance payment for their own personal benefit. The Dillons were free to make whatever deal they wanted with whatever auto repair shop these chose.

Therefore, based on the foregoing, Appellant, Farmers Insurance of Columbus, Inc., respectfully requests the Court reverse the decisions of the Fifth District Court of Appeals. If the Court of Appeals' decision stands, it will be misused and abused as a weapon by insureds to punish insurers for simply issuing vehicle repair estimates, and providing insureds with knowledge concerning the scope and details of such vehicle repairs. The Court of Appeals' ruling also improperly imposes statutory regulation of the insurance industry beyond the scope of Title 39.

II. STANDARD OF REVIEW

Motion for Summary Judgment

The standard of appellate review for the granting or denial of a motion for summary judgment is *de novo*, governed by the same standard set forth in Civ.R. 56. *Comer v. Risko,* 106 Ohio St.3d 185, 186, 2005-Ohio-4459, 833 N.E.2d 712; *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Accordingly, the reviewing court affords no deference to the trial court's decision, and independently reviews the record to determine whether summary judgment is appropriate. *Hollins v. Shaffer,* 182 Ohio App.3d 282, 286, 2009-Ohio-2136, 912 N.E.2d 637. As the Ohio Supreme Court explained, "only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Byrd v. Smith*, 110 Ohio St.3d. 24, 2006-Ohio-3455, 850 N.E.2d 47, ¶ 12.

Under Civ.R. 56(C), summary judgment is proper when the moving party establishes: (1) no genuine issue of any material fact remains; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and construing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *State ex rel Duncan v. Mentor City Council,* 105 Ohio St.3d 372, 2005-Ohio-2163, 826 N.E.2d 832, ¶ 9.

Motion for Judgment on the Pleadings

According to *Euvrard v. Christ Hosp. & Health Alliance*, 141 Ohio App.3d 572, 575, 752 N.E.2d 326 (2001), the standard of appellate review for the granting or denial of a motion for judgment on the pleadings is also *de novo*, giving no deference to the trial court's determination. However, it is axiomatic that a motion for judgment on the pleadings is restricted solely to the

allegations contained in those pleadings. *Id.* *See also Flanagan v. Williams*, 87 Ohio App.3d 768, 623 N.E.2d 185 (1993); *Nelson v. Pleasant*, 73 Ohio App.3d 479, 481, 597 N.E.2d 1137 (1991).

Under Civ.R. 12(C), when a defendant files such a motion, judgment in favor of the defendant is appropriate when the 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. *Trinity Health System v. MDX Corp.*, 180 Ohio App.3d 815, 2009-Ohio-417, 907 N.E.2d 746, ¶ 18.

III. ARGUMENT 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 its insured's claim for motor vehicle damage, and issues a repair estimate.

Nearly every Ohio court addressing the issue has held, as a matter of law, an insured cannot bring a claim against his or her insurer under the CSPA. Furthermore, following the decision of the Court of Appeals drastically increases the scope of coverage under the CSPA. The Court of Appeals' ruling contravenes the well-established Ohio precedent that the CSPA does not apply to any facet of insurance policy disputes.

Moreover, the mandatory statutory elements of a "supplier" and a "consumer transaction" under the CSPA are not present. The CSPA sections at issue are intended to apply to the auto body shop performing the repairs, not to the issues associated with the insurance claim.

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 previously addressed by any courts in any published opinions and lacks any form of legislative history. Pursuant to the statute:

> *(B) 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 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 of your motor vehicle. Warranties applicable to these aftermarket crash parts are provided by the parts manufacturer or distributor rather than by your own motor vehicle 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.*

(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 furnish or read to the person a written notice as described in division (B)(1) of this section at the time that the oral estimate is given or when the person requesting the repair gives his approval for the repair work to commence. If the person has chosen to receive an oral estimate or no estimate, the written notice described in division (B)(1) of this section shall be provided with the final invoice for the repair.

(C) Any non-OEM aftermarket crash part manufactured after the effective date of this act shall have permanently affixed thereto, or inscribed thereon, prior to the installation of the part, the business name or logo of the manufacturer.

Whenever practical, the location of the affixed or inscribed information upon the part shall ensure that the information shall be accessible after installation.

(D) An insurer, repair facility, or installer may use a salvage motor vehicle part in the repair of a motor vehicle, if the salvage motor vehicle part is of a like kind and quality to the part in need of repair and is removed from a salvage motor vehicle by a salvage motor vehicle dealer licensed under Chapter 4738 of the Revised Code.

(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.

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, in any respect.[1]

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[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.*

For instance, in *Miller v. Geico Indemn. Co.*, 2008-Ohio-791, 2008 WL 525415, ¶ 17 (Feb. 28, 2008), Ms. Miller filed suit against Geico raising a CSPA claim. She alleged Geico deliberately padded its vehicle repair estimate to justify declaring the vehicle a total loss. She alleged it was 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 claims. 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 Court of Appeals produces unreasonable results. Such a finding radically 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

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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).

have relied upon for years. Indeed, the Ohio Legislature implemented an entire Title of the Ohio Revised Code (Title 39) specifically to regulate insurance matters.

The Court of Appeals' decision permitted Plaintiffs' counsel to collect unreasonable 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 case with limited and non-contentious discovery, and not extensive motion practice. The Dillons requested and received less than 100 pages of documents during discovery. Only two depositions were taken, which lasted a grand total of 76 minutes. In fact, the fee award was **13 times** the amount of actual damages. The fee award is egregious based on the underlying facts and minimal work to prosecute the claims at the trial court level.

The Municipal Court erred in denying Farmers' Motion for Partial Judgment on the Pleadings and Farmers' Motion for Summary Judgment. 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):

> *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.*

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 addressed** whether Farmers is a supplier and whether a consumer transaction existed.

A consumer transaction is lacking. Recently, the Ohio Supreme Court held the CSPA does not apply to a residential mortgage servicer, as mortgage servicing was not a "consumer transaction." 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 that 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 strictly limited to:

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

A "consumer transaction" is undeniably absent. Farmers did not "transfer" the car parts, but merely created the repair estimate to allow Mission Auto to repair the vehicle. Farmers did not personally purchase, sell, or distribute the car parts. 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. Indeed, the required consumer transaction is missing under these facts.

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. Thus, Farmers is not a "supplier" pursuant to the CSPA.

At no point in time did Mr. Babb or Farmers ever control how or if the vehicle was going to be repaired, but rather simply set the price of the estimate. The Dillons, like other insureds do, could just as easily chosen not to repair the vehicle, and kept the insurance payment for their own personal benefit. The Dillons were free to make whatever deal they wanted with whatever auto repair shop these chose.

Therefore, the necessary prerequisites of a "consumer transaction" and a "supplier" under the CSPA are lacking, and the decisions of the Fifth District Court of Appeals must be reversed.

> **<u>Proposition of Law No. 2:</u> 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 its insured of the content of the estimate; and the insured chooses the repair facility.**

The Dillons were actually provided both written and oral estimates by Farmers. 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.

Mr. Dillon selected his own personal repair shop. He was orally notified of the contents of the written vehicle repair estimate on multiple occasions, and elected to proceed with the repairs using solely OEM parts. He testified he was well-aware of the differences between OEM and non-OEM parts, and knew the policy provisions in dispute. He simply was not ever actually deceived, confused, or misled.

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

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 * * * 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 of your motor vehicle. Warranties applicable to these aftermarket crash parts are provided by the parts manufacturer or distributor rather than by your own motor vehicle 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.*
> >
> > *(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 furnish or read to the person a written notice as described in division (B)(1) of this section at the time that the oral estimate is given or when the person requesting the repair gives his approval for the repair work to commence. If the*

> *person has chosen to receive an oral estimate or no estimate, the written notice described in division (B)(1) of this section shall be provided with the final invoice for the repair. (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. Indeed, it appears the purpose behind this statutory provision is to verify the estimate provided accurately and properly reflects the actual estimate initially requested by the individual. R.C. §1345.81 acts a "check and balance" to protect the individual if, and only if, the individual chooses to receive a specific estimate form.

The record instead indicates the Dillons were actually provided both a written and an oral estimate by Farmers. Both Mr. Babb and Mr. Dillon testified the Dillons did not at any point request a specific form of estimate. 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. Further, the Dillons were well-aware of the accurate content of the estimate provided by Farmers. 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, and the Court of Appeals' decisions must be reversed.

B. **The Appellees were never deceived, and Appellant 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 absolutely 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 selected his own personal repair shop. He was orally notified of the contents of the written vehicle repair estimate on multiple occasions. He testified he was well-aware of the differences between OEM and non-OEM parts, and knew the policy provisions in dispute.

Armed with this knowledge, Mr. Dillon later changed his mind and instructed Mission Auto to repair the vehicle solely with 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. The Dillons, like other insureds do, could

just as easily chosen not to repair the vehicle, and kept the insurance payment for their own personal benefit. The Dillons were free to make whatever deal they wanted with whatever auto repair shop they chose. At no point in time were the Dillons ever misled, confused, or deceived. If anything, their actions were calculated.

Therefore, Farmers did not in any respect violate the provisions of the CSPA, and the decisions of the Fifth District Court of Appeals should be reversed.

IV. CONCLUSION

Based on the foregoing, Appellant, Farmers Insurance of Columbus, Inc., respectfully requests the Court reverse the decisions of the Fifth District Court of Appeals.

First, the CSPA was not intended to address disputes between insurers and their insureds. Almost 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. Following the decision of the Court of Appeals 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. The Court of Appeals' decision now first time in history erroneously subjects insurers to awards of treble damages and outlandish attorney fees, such as the egregious attorney fee award in this matter of 13 times the actual damages.

Second, the mandatory elements of a "supplier" and a "consumer transaction" under the CSPA are not present. The CSPA is intended to apply to the auto body shop that 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. However, the Court of Appeals never addressed these mandatory elements under the CSPA.

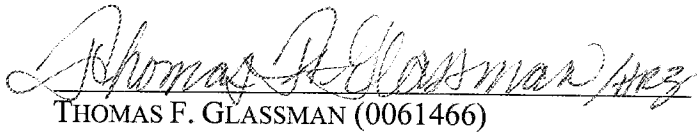
Third, R.C. §1345.81 is inapplicable where, as here, the insured does not choose the form of vehicle repair estimate to receive. The Dillons were actually provided both a written and an

oral estimate by Farmers. At no point did the Dillons make any elections as to what type of estimate they wanted to receive.

Lastly, the Dillons were never actually deceived, confused, or misled by Farmers or anyone else. Mr. Dillon selected his own personal repair shop. He was orally notified of the contents of the written vehicle repair estimate on multiple occasions, and unilaterally elected to proceed with the repairs using solely OEM parts. He testified he was well-aware of the differences between OEM and non-OEM parts, and knew the policy provisions in dispute.

Therefore, Appellant, Farmers Insurance of Columbus, Inc., respectfully requests the Court reverse the decisions of the Fifth District Court of Appeals. If the Court of Appeals' decision stands, it will be misused as a weapon by insureds to punish insurers for simply issuing vehicle repair estimates, and providing insureds with knowledge concerning the scope of such vehicle repairs. The Court of Appeals' ruling also regulates the insurance industry beyond the scope of Title 39, and is in direct contravention to all prior Ohio court decisions.

Respectfully submitted,



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Counsel for Defendant-Appellant, Farmers Insurance of Columbus, Inc.

CERTIFICATE OF SERVICE

A true copy of the foregoing *Merit Brief of Appellant* was sent by U.S. Mail, postage prepaid, this 11th day of July 2014, upon:

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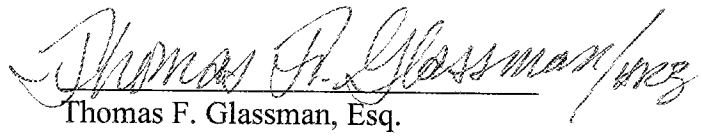

Thomas F. Glassman, Esq.

12-12994 February 28, 2014 (ALS:vl)
Attorney for Farmers Insurance of Columbus, Inc.

№ 2014-_____ 14-0451

In the Supreme Court of Ohio

FARMERS INSURANCE OF COLUMBUS, INC.,

Defendant-Appellant

v.

JERRY DILLON, et al.,

Plaintiffs-Appellees

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

NOTICE OF APPEAL

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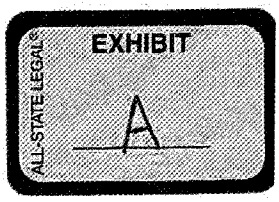
FILED
MAR 24 2014
CLERK OF COURT
SUPREME COURT OF OHIO



Notice of Appeal of Appellant,
Farmers Insurance of Columbus, Inc.

Appellant, Farmers Insurance of Columbus, Inc., hereby gives notice of its appeal to the Ohio Supreme Court from the judgment and order of the Coshocton County Court of Appeals, Fifth Appellate District, entered in Court of Appeals Case No. 2013-CA-0014, *Jerry Dillon, et al. v. Farmers Insurance of Columbus, Inc.*, on February 6, 2014.

This case is one of public and great general interest.

Respectfully submitted,

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Counsel for Defendant-Appellant,
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CERTIFICATE OF SERVICE

A true copy of the foregoing *Notice of Appeal* was sent by U.S. Mail, postage prepaid, this 24th day of March, 2014, upon:

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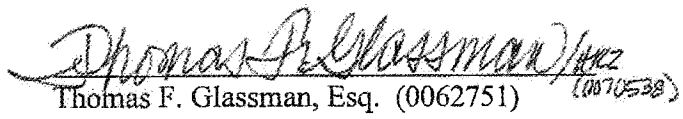

Thomas F. Glassman, Esq. (0062751)

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

COURT OF APPEALS
COSHOCTON COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
JERRY DILLON AND NANCY DILLON	:	Hon. W. Scott Gwin, P.J.
	:	Hon. Sheila G. Farmer, J.
	:	Hon. John W. Wise, J.
Plaintiffs-Appellees	:	
	:	
-vs-	:	Case No. 2013CA0014
	:	
FARMERS INSURANCE OF COLUMBUS, INC.	:	
	:	OPINION
Defendant-Appellant		

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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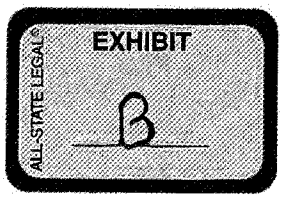


Gwin, P.J.

{¶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 utilized 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.

{¶4} 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."

{¶5} 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.

{¶6} 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.

{¶7} 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 of 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.

{¶37} 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

12-12994
TFG/mso

IN THE COSHOCTON MUNICIPAL COURT
COSHOCTON COUNTY, OHIO

JERRY DILLON and NANCY DILLON	:	
Plaintiff	:	
-vs-	:	JUDGMENT ENTRY
FARMER'S INSURANCE OF COLUMBUS INC	:	CVE 1100847
Defendant	:	

COSHOCTON MUNICIPAL COURT
COSHOCTON COUNTY, OHIO
2012 APR 27 PM 12:51

* * * * * * * *

The matter before the Court this 27th day of April, 2012, concerns plaintiffs' motion for summary judgment on their fourth (4th) cause of action, defendants' memorandum in opposition to plaintiffs' motion for summary judgment and defendants' motion for summary judgment, plaintiffs' reply memorandum to defendants' memorandum contra to plaintiffs' motion for summary judgment and plaintiffs' memorandum contra to defendants' motion for summary judgment, and, defendants' reply in support of its' motion for summary judgment.

Upon consideration thereof, and after review of the case file and the written depositions filed by both parties, it appears to the Court that defendant has stepped outside of the protections of the Consumer Sales Practices Act (CSPA) in attempts to lower their losses. Plaintiffs' motion for summary judgment as to their fourth (4th) cause of action is therefore GRANTED and defendants' cross motion for summary judgment is DENIED. Pre-trial hearing as to remaining issues shall proceed on TUESDAY, JUNE 12, 2012, at 11:00 a.m. as scheduled.

Timothy L. France, Municipal Judge

ALL-STATE LEGAL
EXHIBIT
C

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing judgment entry was served upon Attorney James R. Skelton by placing same in his mailbasket located in the clerk's office and by regular U. S. Mail upon Attorney Matthew J. Dougherty at Smith, Rolfes & Skavdahl Company, LPA, 600 Vine Street Suite 2600, Cincinnati, Ohio 45202 on this 27th day of April, 2012.

12-129

IN THE COSHOCTON MUNICIPAL COURT
COSHOCTON COUNTY, OHIO

JERRY DILLON and NANCY DILLON	:	
Plaintiffs	:	
-vs-	:	JUDGMENT ENTRY
FARMERS INSURANCE OF COLUMBUS INC	:	CVE 1100847
Defendant	:	

* * * * * * * *

The matter before the Court this 21st day of March, 2012, concerns defendants' motion for partial judgment on the pleadings filed February 23, 2012, wherein they request that plaintiffs' second through eighth causes of action be ruled on in their favor and to grant reasonable attorney fees; plaintiffs' memorandum contra defendants' motion for judgment on the pleadings; and, defendants' reply in support of its' motion for partial judgment on the pleadings.

Upon review of the case file and in consideration of said pleadings, defendants' motion for summary judgment is not well taken and the same is, accordingly, DENIED.

Timothy L. France, Municipal Judge

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing judgment entry was served upon Attorney James R. Skelton by placing same in his mailbasket located in the clerk's office and upon Attorney Matthew J. Dougherty by regular U. S. Mail at 600 Vine Street, Suite 2600, Cincinnati, Ohio 45202 on this 22nd day of March, 2012.

Clerk Deputy Clerk

ALL-STATE LEGAL® EXHIBIT D

§ 1345.01. Consumer sales practices definitions.

Ohio Statutes

Title 13. COMMERCIAL TRANSACTIONS - OHIO UNIFORM COMMERCIAL CODE

Chapter 1345. CONSUMER SALES PRACTICES

Current with Legislation effective as of 12/1/2013

§ 1345.01. Consumer sales practices definitions

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

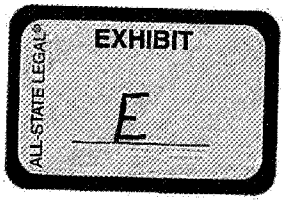
(A) "Consumer transaction" means a sale, lease, assignment, award by chance, or other transfer of an item of goods, a service, a franchise, or an intangible, to an individual for purposes that are primarily personal, family, or household, or solicitation to supply any of these things. "Consumer transaction" does not include transactions between persons, defined in sections 4905.03 and 5725.01 of the Revised Code, and their customers, except for transactions involving a loan made pursuant to sections 1321.35 to 1321.48 of the Revised Code and transactions in connection with residential mortgages between loan officers, mortgage brokers, or nonbank mortgage lenders and their customers; transactions involving a home construction service contract as defined in section 4722.01 of the Revised Code; transactions between certified public accountants or public accountants and their clients; transactions between attorneys, physicians, or dentists and their clients or patients; and transactions between veterinarians and their patients that pertain to medical treatment but not ancillary services.

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

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

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

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



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

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

(H) (1) "Loan officer" means an individual who for compensation or gain, or in anticipation of compensation or gain, takes or offers to take a residential mortgage loan application; assists or offers to assist a buyer in obtaining or applying to obtain a residential mortgage loan by, among other things, advising on loan terms, including rates, fees, and other costs; offers or negotiates terms of a residential mortgage loan; or issues or offers to issue a commitment for a residential mortgage loan. "Loan officer" also includes a loan originator as defined in division (E)(1) of section 1322.01 of the Revised Code.

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

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

(J) (1) "Mortgage broker" means any of the following:

(a) A person that holds that person out as being able to assist a buyer in

obtaining a mortgage and charges or receives from either the buyer or lender money or other valuable consideration readily convertible into money for providing this assistance;

(b) A person that solicits financial and mortgage information from the public, provides that information to a mortgage broker or a person that makes residential mortgage loans, and charges or receives from either of them money or other valuable consideration readily convertible into money for providing the information;

(c) A person engaged in table-funding or warehouse-lending mortgage loans that are residential mortgage loans.

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

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

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

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

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

Cite as R.C. § 1345.01

History. Amended by 129th General AssemblyFile No.107,HB 383, §1, eff. 8/31/2012.

Amended by 128th General AssemblyFile No.17,SB 124, §1, eff. 12/28/2009.

Amended by 128th General AssemblyFile No.9,HB 1, §101.01, eff. 10/16/2009.

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

Related Legislative Provision: *See 128th General AssemblyFile No.17,SB 124, §5*

See 128th General AssemblyFile No.9,HB 1, §745.60.

§ 1345.02. Unfair or deceptive acts or practices.

Ohio Statutes

Title 13. COMMERCIAL TRANSACTIONS - OHIO UNIFORM COMMERCIAL CODE

Chapter 1345. CONSUMER SALES PRACTICES

Current with Legislation effective as of 12/1/2013

§ 1345.02. Unfair or deceptive acts or practices

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(E) (1) No supplier, in connection with a consumer transaction involving natural gas service or public telecommunications service to a consumer in this state, shall request or submit, or cause to be requested or submitted, a change in the consumer's provider of natural gas service or public telecommunications service, without first obtaining, or causing to be obtained, the verified consent of the consumer. For the purpose of this division and with respect to public telecommunications service only, the procedures necessary for verifying the consent of a consumer shall be those prescribed by rule by the public utilities commission for public telecommunications service under division (D) of section 4905.72 of the Revised Code. Also, for the purpose of this division, the act, omission, or failure of any officer, agent, or other individual, acting for or employed by another person, while acting within the scope of that authority or employment, is the act or failure of that other person.

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

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

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

(1) Knowingly failing to provide disclosures required under state and federal law;

(2) Knowingly providing a disclosure that includes a material misrepresentation.

Cite as R.C. § 1345.02

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

§ 1345.09. Private causes of action.

Ohio Statutes

Title 13. COMMERCIAL TRANSACTIONS - OHIO UNIFORM COMMERCIAL CODE

Chapter 1345. CONSUMER SALES PRACTICES

Current with Legislation effective as of 12/1/2013

§ 1345.09. Private causes of action

For a violation of Chapter 1345. of the Revised Code, a consumer has a cause of action and is entitled to relief as follows:

(A) Where the violation was an act prohibited by section 1345.02 , 1345.03 , or 1345.031 of the Revised Code, the consumer may, in an individual action, rescind the transaction or recover the consumer's actual economic damages plus an amount not exceeding five thousand dollars in noneconomic damages.

(B) Where the violation was an act or practice declared to be deceptive or unconscionable by rule adopted under division (B)(2) of section 1345.05 of the Revised Code before the consumer transaction on which the action is based, or an act or practice determined by a court of this state to violate section 1345.02 , 1345.03 , or 1345.031 of the Revised Code and committed after the decision containing the determination has been made available for public inspection under division (A)(3) of section 1345.05 of the Revised Code, the consumer may rescind the transaction or recover, but not in a class action, three times the amount of the consumer's actual economic damages or two hundred dollars, whichever is greater, plus an amount not exceeding five thousand dollars in noneconomic damages or recover damages or other appropriate relief in a class action under Civil Rule 23, as amended.

(C) (1) Except as otherwise provided in division (C)(2) of this section, in any action for rescission, revocation of the consumer transaction must occur within a reasonable time after the consumer discovers or should have discovered the ground for it and before any substantial change in condition of the subject of the consumer transaction.

(2) If a consumer transaction between a loan officer, mortgage broker, or nonbank mortgage lender and a customer is in connection with a residential mortgage, revocation of the consumer transaction in an action for rescission is only available to a consumer in an individual action, and shall occur for no reason other than one or more of the reasons set forth in the "Truth in Lending Act," 82 Stat. 146 (1968),

15 U.S.C. 1635 , not later than the time limit within which the right of rescission under section 125(f) of the "Truth in Lending Act" expires.

(D) Any consumer may seek a declaratory judgment, an injunction, or other appropriate relief against an act or practice that violates this chapter.

(E) When a consumer commences an individual action for a declaratory judgment or an injunction or a class action under this section, the clerk of court shall immediately mail a copy of the complaint to the attorney general. Upon timely application, the attorney general may be permitted to intervene in any private action or appeal pending under this section. When a judgment under this section becomes final, the clerk of court shall mail a copy of the judgment including supporting opinions to the attorney general for inclusion in the public file maintained under division (A)(3) of section 1345.05 of the Revised Code.

(F) The court may award to the prevailing party a reasonable attorney's fee limited to the work reasonably performed and limited pursuant to section 1345.092 of the Revised Code, if either of the following apply:

(1) The consumer complaining of the act or practice that violated this chapter has brought or maintained an action that is groundless, and the consumer filed or maintained the action in bad faith;

(2) The supplier has knowingly committed an act or practice that violates this chapter.

(G) As used in this section, "actual economic damages" means damages for direct, incidental, or consequential pecuniary losses resulting from a violation of Chapter 1345. of the Revised Code and does not include damages for noneconomic loss as defined in section 2315.18 of the Revised Code.

(H) Nothing in this section shall preclude a consumer from also proceeding with a cause of action under any other theory of law.

Cite as R.C. § 1345.09

History. Amended by 129th General AssemblyFile No.97,HB 275, §1, eff. 7/3/2012.

Amended by 128th General AssemblyFile No.17,SB 124, §1, eff. 12/28/2009.

Amended by 128th General AssemblyFile No.9,HB 1, §101.01, eff. 10/16/2009.

Effective Date: 08-11-1978; 2006 SB185 01-01-2007; 2006 SB117 10-31-2007

Related Legislative Provision: *See 128th General AssemblyFile No.17,SB 124, §5*

See 128th General AssemblyFile No.9,HB 1, §745.60.

§ 1345.81. Using nonoriginal equipment manufacturer aftermarket crash parts.

Ohio Statutes

Title 13. COMMERCIAL TRANSACTIONS - OHIO UNIFORM COMMERCIAL CODE

Chapter 1345. CONSUMER SALES PRACTICES

Current with Legislation effective as of 12/1/2013

§ 1345.81. Using nonoriginal equipment manufacturer aftermarket crash parts

(A) As used in this section:

(1) "Aftermarket crash part" means a replacement for any of the nonmechanical sheet metal or plastic parts that generally constitute the exterior of a motor vehicle, including inner and outer panels.

(2) "Nonoriginal equipment manufacturer aftermarket crash part" or "non-OEM aftermarket crash part" means any aftermarket crash part that is not made by or for the manufacturer of the motor vehicle.

(3) "Repair facility" means any motor vehicle dealer, garage, body shop, or other commercial entity that undertakes the repair or replacement of those parts that generally constitute the exterior of a motor vehicle.

(4) "Installer" means any individual who actually performs the work of replacing or repairing parts of a motor vehicle.

(5) "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.

(B) 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 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 of your motor vehicle. Warranties applicable to these aftermarket crash parts are provided by the parts manufacturer or distributor rather than by your own motor vehicle 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.

(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 furnish or read to the person a written notice as described in division (B)(1) of this section at the time that the oral estimate is given or when the person requesting the repair gives his approval for the repair work to commence. If the person has chosen to receive an oral estimate or no estimate, the written notice described in division (B)(1) of this section shall be provided with the final invoice for the repair.

(C) Any non-OEM aftermarket crash part manufactured after the effective date of this act shall have permanently affixed thereto, or inscribed thereon, prior to the installation of the part, the business name or logo of the manufacturer.
Whenever practical, the location of the affixed or inscribed information upon the part shall ensure that the information shall be accessible after installation.

(D) An insurer, repair facility, or installer may use a salvage motor vehicle part in the repair of a motor vehicle, if the salvage motor vehicle part is of a like kind and quality to the part in need of repair and is removed from a salvage motor vehicle by a salvage motor vehicle dealer licensed under Chapter 4738. of the Revised Code.

(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.

Cite as R.C. § 1345.81

History. Effective Date: 10-16-1990

5725.01 Financial institution - dealers in intangibles - insurance company definitions.

As used in sections 5725.01 to 5725.26 of the Revised Code:

(A) "Financial institution" means:

(1) A national bank organized and existing as a national bank association pursuant to the "National Bank Act," 12 U.S.C. 21 ;

(2) A federal savings association or federal savings bank that is chartered under 12 U.S.C. 1464 ;

(3) A bank, banking association, trust company, savings and loan association, savings bank, or other banking institution that is incorporated or organized under the laws of any state;

(4) Any corporation organized under 12 U.S.C. 611 to 631 ;

(5) Any agency or branch of a foreign depository as defined in 12 U.S.C. 3101 ;

(6) A company licensed as a small business investment company under the "Small Business Investment Act of 1958," 72 Stat. 689, 15 U.S.C. 66l, as amended; or

(7) A company chartered under the "Farm Credit Act of 1933," 48 Stat. 257, 12 U.S.C. 1131(d) , as amended.

Corporations or institutions organized under the "Federal Farm Loan Act" and amendments thereto, insurance companies, and credit unions shall not be considered financial institutions or dealers in intangibles within the meaning of such sections.

(B)

(1) "Dealer in intangibles" includes every person who keeps an office or other place of business in this state and engages at such office or other place in a business that consists primarily of lending money, or discounting, buying, or selling bills of exchange, drafts, acceptances, notes, mortgages, or other evidences of indebtedness, or of buying or selling bonds, stocks, or other investment securities, whether on the person's own account with a view to profit, or as agent or broker for others, with a view to profit or personal earnings. Dealer in intangibles excludes institutions used exclusively for charitable purposes, insurance companies, and financial institutions. The investment of funds as personal accumulations or as business reserves or working capital does not constitute engaging in a business within the meaning of this division; but a person who, having engaged in a business that consists primarily of lending money, or discounting, buying, or selling bills of exchange, drafts, acceptances, notes, mortgages, or other evidences of indebtedness on the person's own account, remains in business primarily for the purpose of realizing upon the assets of the business is deemed a dealer in intangibles, though not presently engaged in a business that consists primarily of lending money or discounting or buying such securities.

(2) The tax commissioner shall adopt a rule defining "primarily" as that term is used in division (B)(1) of this section.

(C) "Insurance company" includes 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, or of indemnifying or guaranteeing against loss or damage, or acting as surety on bonds or undertakings. "Insurance company" also includes any health insuring corporation as defined in section 1751.01 of the Revised Code.

(D) "Domestic insurance company" includes every insurance company organized and existing under the laws of this state, and every unincorporated association and society formed under the laws of this state for the purpose of engaging in said business, except a company, association, or society that is an insurance holding company affiliate controlled by a nonresident affiliate and has risks in this state formerly written by its foreign affiliates in a total amount exceeding the risks outstanding on the taxpayer's latest annual report that arise from business initially written by it in this state; and excludes every foreign insurance company. As used in this division, terms defined in section 3901.32 of the Revised Code have the same meanings given to them in that section.

(E) "Foreign insurance company" includes every insurance company organized or existing under the laws of any other state, territory, country, or the United States and every insurance holding company affiliate excepted under division (D) of this section.

(F) "Credit union" means a nonprofit cooperative financial institution organized or chartered under the laws of this state, of another state, or of the United States.

Effective Date: 06-30-1997; 09-29-2005; 04-14-2006