

ORIGINAL

---

**IN THE SUPREME COURT OF OHIO**

CASE NO. 2014-0451

-----

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

-----

**JERRY DILLON, et al.,**  
*Plaintiff-Appellee,*

vs.

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

---

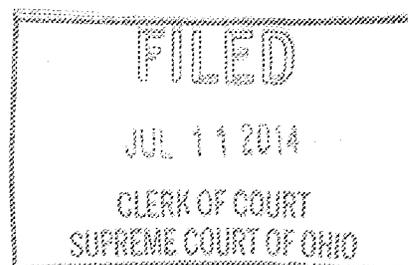
**BRIEF OF AMICUS CURIAE, OHIO ASSOCIATION OF CIVIL TRIAL ATTORNEYS  
URGING REVERSAL ON BEHALF OF DEFENDANTS-APPELLANTS**

---

Jamey T. Pregon (0075262)  
[Jamey@dinklerpregon.com](mailto:Jamey@dinklerpregon.com)  
Lynnette Dinkler (0065455)  
[Lynnette@dinklerpregon.com](mailto:Lynnette@dinklerpregon.com)  
DINKLER PREGON, LLC  
5335 Far Hills, Suite 123  
Dayton, OH 45429  
(937) 426-4200  
(866) 831-0904 (fax)  
*Attorneys for Amicus Curiae,*  
*Ohio Association of Civil Trial Attorneys*

James M. Skelton (0059201)  
[jim@coshocotonlaw.com](mailto:jim@coshocotonlaw.com)  
309 Main Street  
Coshocoton, OH 43218  
(740) 622-2011 / (740) 622-0100 (fax)  
*Attorney for Plaintiffs-Appellees*

Thomas F. Glassman (0061466)  
[tglassman@smithrolfes.com](mailto:tglassman@smithrolfes.com)  
Matthew J. Smith (0006788)  
[msmith@smithrolfes.com](mailto:msmith@smithrolfes.com)  
Andrew L. Smith (0086468)  
[asmith@smithrolfes.com](mailto:asmith@smithrolfes.com)  
SMITH ROLFES & SKAVDAHL CO., LPA  
600 Vine Street, Suite 2600  
Cincinnati, OH 45202  
(513) 579-0080  
(513) 579-0222 (fax)  
*Attorneys for Defendant-Appellant*



**TABLE OF CONTENTS**

Table of Authorities..... iii

Statement of the Facts .....1

    I-Introduction and Overview.....1

    II-The Dillons Insurance Claim .....4

Argument .....6

    Proposition of Law No.1 .....6

    Proposition of Law No.2.....9

Conclusion .....11

Proof of Service .....11

## TABLE OF AUTHORITIES

### Cases

<i>Scott–Pontzer v. Liberty Mut. Fire Ins. Co.</i> , 85 Ohio St.3d 660 (1999) .....	1, 3
<i>Johnson v. Lincoln Natl. Life Ins. Co.</i> , 69 Ohio App.3d 249, 255, 590 N.E.2d 761 (1990) .....	1
<i>Bigelow v. American Family Insurance</i> , Coshocton App. No. 2013CA0024, 2014 WL 2998599, 2014-Ohio-2945 (5 <sup>th</sup> Dist. 2014) .....	3
<i>Peterson v. Progressive Corp.</i> , Cuyahoga App. No. 87676, 2006 WL 3378424, 2006-Ohio-6175 (8 <sup>th</sup> Dist. 2006) .....	4
<i>Kincaid v. Erie Ins. Co.</i> , 128 Ohio St.3d 322, 944 N.E.2d 207 (2010) .....	6
<i>Dillon v. Farmers Ins. of Columbus</i> , Coshocton App. 2013CA0014, 2014-Ohio-43, at ¶24) .....	7
<i>Buckley v. Wilkins</i> , 105 Ohio St.3d 350, 353-54 (2005) .....	9
<i>Ferron v. EchoStar Satellite, LLC</i> , 727 F.Supp.2d 647, 656 (S.D. Ohio 2009) .....	9
<i>Thompson v. Jim Dixon Lincoln Mercury, Inc.</i> , Butler App. No. 82-11-0109 (April 27, 1983), unreported, 1983 WL 4353 .....	9
<i>McCullough v. Spitzer Motor Ctr.</i> , Cuyahoga App. No. 64465, 1994 WL 24281 (Jan. 27, 1994) .....	9
<i>Cicero v. Am. Satellite, Inc.</i> , 10 <sup>th</sup> Dist. No. 10AP-638, 2011-Ohio-4918, ¶19 .....	9, 10

### Statutes

Ohio Administrative Code Chapter 3901 .....	3
O.R.C. §1.51 .....	8
O.R.C. §1.52(A) .....	7
O.R.C. Title 39 .....	1, 2, 4
O.R.C. §1345.01 .....	6-9
O.R.C. §1345.01(A) .....	3, 6
O.R.C. §1345.02 .....	6-8
O.R.C. §1345.02(A) .....	9
O.R.C. §1345.09(A) .....	3, 8
O.R.C. §1345.09(D) .....	3, 8
O.R.C. §1345.81 .....	2, 3, 6-10
O.R.C. §1345.81(B)(1) .....	7, 8

O.R.C. §1345.81(B)(2) .....	7
O.R.C. §1345.81(E) .....	6-8, 10
O.R.C. §5725.01 .....	3, 6
O.R.C. §5725.01(C), (D), and (F) .....	4, 6

**Other References**

<a href="http://www.ohioinsurance.org/factbook/2006/chapter2/chapter2_c_2008.asp">http://www.ohioinsurance.org/factbook/2006/chapter2/chapter2_c_2008.asp</a> (visited July 9, 2014) .....	2
---	---

## STATEMENT OF FACTS

### I. INTRODUCTION AND OVERVIEW

The Ohio Association of Civil Trial Attorneys (“OACTA”) respectfully submits the following amicus curiae brief in support of Defendant-Appellant, Farmers Insurance of Columbus, Inc. (“Farmers”). This case presents the Court with an opportunity to correct a misconstruction of the Ohio Consumer Sales Practices Act (“CSPA”), and the misapplication of the CSPA to a property damage insurance claim. The outcome of this case, and the precedent it sets, threatens to destabilize the insurance industry in Ohio in a way not seen since *Scott–Pontzer v. Liberty Mut. Fire Ins. Co.*, 85 Ohio St.3d 660 (1999) and its progeny.

The municipal court, followed by the Fifth Appellate District, has now held for the first time that the Ohio Consumer Sales Practices Act (“CSPA”) applies to an insurance claim. This is contrary to what other courts in Ohio have held with respect to the CSPA’s application in the context of insurance contracts and transactions. See, e.g., *Johnson v. Lincoln Natl. Life Ins. Co.*, 69 Ohio App.3d 249, 255, 590 N.E.2d 761 (1990)(“[i]t is clear the Ohio Legislature meant to regulate the insurance industry in R.C. Title 39 and that the Ohio Consumer Sales Practices Act has no application to controversies over insurance policies”).

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

As Defendant-Appellant has noted, there were 287,050 automobile accidents in Ohio in 2012, and automobile damage claims are the most common form of insurance claim filed in

Ohio. In 2008, the Ohio Insurance Institute reported there is one automobile crash for every 37.2 registered vehicles in Ohio.<sup>1</sup> It is no stretch to recognize that if an insurer's exposure in such claims has the potential to dramatically increase, shockwaves will be felt throughout Ohio, and insured's will ultimately pay the price in higher premiums, or possibly be presented with fewer choices when looking for insurers, in the event some insurers conclude such potential exposure makes it too costly to do business in Ohio.

This case is a good example of what can happen in this new frontier of CSPA litigation against insurers. Here, an insured had a dispute with his insurer over Original Manufacturer Equipment (OME) used in repairs done to his automobile. The parties stipulated that the insured's actual damages were \$1,521.07. When this insurance dispute became a CSPA claim, the insured was awarded treble damages in the amount of \$4,563.21, litigation expenses in the amount of \$3,989.38, and attorney fees in the amount of \$20,540.00. Thus, an insurance dispute that had a value of **\$1,521.07** was transformed into a CSPA claim with a value of **\$29,092.59**, nearly *twenty times* the value of the insured's actual damages in this dispute.<sup>2</sup>

The facts of this case demonstrate that Farmers was not engaging in a "consumer transaction," which triggers the protections of the CSPA, but instead, Farmers was merely adjusting an insurance claim. That process is governed by Title 39 of the Ohio Revised Code. To the extent that O.R.C. §1345.81 applied to the Dillons' dealings with Farmers, even if it were found that Farmers somehow did not comply with O.R.C. §1345.81, then the Dillons still were not entitled to treble damages and attorney fees. The Dillons could have elected to rescind the

---

<sup>1</sup> [http://www.ohioinsurance.org/factbook/2006/chapter2/chapter2\\_c\\_2008.asp](http://www.ohioinsurance.org/factbook/2006/chapter2/chapter2_c_2008.asp) (visited July 9, 2014).

<sup>2</sup> The actual value of Mr. Dillon's claim was approximately \$10,000. His automobile was damaged when he struck a deer. Mr. Dillon's dispute with Farmers was over the use of OME parts in the repair, which was expressly permitted by the insurance contract. Mr. Dillon decided to have the repair done with solely OME parts, which is where the \$1,521.07 damages claim comes into play. The CSPA litigation in this case turned a \$10,000 claim into a \$40,000 claim.

agreement under O.R.C. §1345.09(A), or they could have sought a declaratory judgment, injunction, or other relief under O.R.C. §1345.09(D).

The misapplication of O.R.C. §1345.81 now threatens to dramatically increase exposure for insurers that was never anticipated in the handling of automobile property damage claims. Attorney fee awards in CSPA cases routinely dwarf the amount of actual damages to consumers, with the fee award in this case standing as an example. Bringing this approach into the insurance claim-handling industry brings the same kind of uncertainty to the industry that rose and fell with *Scott-Pontzer*. The Fifth District has already followed its precedent in this case in upholding another outrageous fee award in an OME case against an insurer under the CSPA. *Bigelow v. American Family Insurance*, Coshocton App. No. 2013CA0024, 2014 WL 2998599, 2014-Ohio-2945 (5<sup>th</sup> Dist. 2014)(insured claimed \$161.19 in actual damages, resulted in treble damages of \$483.57, expenses of \$326.44, and attorney fees in the amount of \$17,640).<sup>3</sup> There is no way of knowing how many claims will travel down this path while the window opened by the Fifth District remains open, but the more that do, the more damage will be done to the industry. This damage will trickle down to the millions of Ohio's insureds, which is exactly what occurred during the reign of *Scott-Pontzer*.

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

---

<sup>3</sup> The *Bigelow* case was also prosecuted by counsel for the Dillons.

§5725.01(C), (D), and (F) specifically includes insurance companies formed or doing business in Ohio).

The bottom line is that Ohio's insureds are protected by Title 39 of the Ohio Revised Code, and by Ohio's Department of Insurance. Insureds with disputes over whether their insurer will pay for the use of OME in their car repairs are free to litigate their disputes in Ohio's courts. See, e.g., *Peterson v. Progressive Corp.*, Cuyahoga App. No. 87676, 2006 WL 3378424, 2006-Ohio-6175 (8<sup>th</sup> Dist. 2006). Turning the CSPA loose—and the bloated attorney fee awards that follow—on the insurance industry will do nothing but destabilize the industry and result in higher premiums for Ohio's insureds, and quite possibly, fewer insurers to choose from.

This is not a road that Ohio has to travel down. The Court can stop this issue in its infancy, and correctly interpret the CSPA as it applies to insurers and disputes over the use of OME in the claim-handling process. Insurers should not be subjected to treble damages and attorney fees under the CSPA for such disputes that arise during the course of adjusting and handling claims.

## **II. THE DILLONS' INSURANCE CLAIM**

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

Farmers' dealings with the Dillons and the repair shop that did the work on the Dillons' car, Mission Auto, were limited to the following:

1. Contacting the Dillons about their insurance coverage and the claim adjustment process;
2. Inspecting the vehicle;
3. Creating the vehicle repair estimate; and

4. Issuing payments to the Dillons and Mission Auto for the authorized repair work.

As such, Farmers did not sell the car parts, but merely created the repair estimate. Further, there is no evidence in the record that the Dillons chose to receive a written or an oral estimate from Farmers. There was no evidence introduced at the trial court level that Farmers in any way affected or influenced the repair process. The only business Farmers is involved in is that of providing insurance policies and benefits. Farmers was never going to perform the repairs or control whether or how the work was to be performed. Farmers' role is contractually defined and is limited to establishing the amount owed.

The applicable insurance policy, which permitted use of both OME and non-OME parts to repair the vehicle. In fact, the applicable policy states as follows:

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

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

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

There was no dispute that Mr. Dillon did not inform Farmers' adjuster that he only wanted OME parts used in the repair. Mr. Dillon only later told Mission Auto to use OME parts,

which resulted in the \$1,521.07 difference between Farmers' estimate and the actual work done by Mission Auto, using OME parts.

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

### ARGUMENT

**Proposition of Law No. 1: An insurer does not engage in a “consumer transaction” for the purposes of any provision of the Ohio Consumer Sales Practices Act (R.C. §1345.01 *et seq.*), when it adjusts an insured’s claim for motor vehicle damage, and issues a repair estimate.**

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

(E) Any violation of this section in connection with a *consumer transaction as defined in section 1345.01* of the Revised Code is an unfair and deceptive act or practice as defined by section 1345.02 of the Revised Code.

O.R.C. §1345.81(E)(emphasis added).

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

statutory scheme. On its very face, the CSPA does not apply to insurance companies in transactions with their insureds.

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

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

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

with the oral discussions concerning non-OME parts in the estimate. Thus, the Dillons did not make any elections as to what type of estimate they wanted to receive, and as such, O.R.C. §1345.81(B)(1) is not even implicated by the facts in this case.

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

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

On the other hand, if it is found that O.R.C. §1345.81 is internally inconsistent, then it should not be enforced against Farmers in this matter. This Court has held that civil statutes are

unconstitutionally vague if the statute is “so vague and indefinite as really to be no rule [or standard] at all or if it is substantially incomprehensible.” *Buckley v. Wilkins*, 105 Ohio St.3d 350, 353-54 (2005). While it appears that O.R.C. §1345.81 is not internally inconsistent, if the lower court found an inconsistency, it should not have construed it against Farmers. The court simply should have not enforced it.

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

**Proposition of Law No. 2: An insurer’s issuance of a repair estimate for the use of OME and non-OME parts is not an “unfair or deceptive act or practice” pursuant to any provision of the Ohio Consumer Sales Practices Act (R.C. §1345.01 et seq.), where the estimate complies with the express terms of the applicable insurance policy; the insurer orally notifies the insured of the content of the estimate; and the insured chooses the repair facility.**

Under the CSPA, “no supplier shall commit an unfair or deceptive act or practice in connection with a consumer transaction.” See R.C. 1345.02(A). In Ohio, “deception is measured from the standpoint of the consumer asserting the OCSPA claim.” *Ferron v. EchoStar Satellite, LLC*, 727 F.Supp.2d 647, 656 (S.D. Ohio 2009). “[T]he basic test is one of fairness as the act need not rise to the level of fraud, negligence or breach of contract.” *Thompson v. Jim Dixon Lincoln Mercury, Inc.*, Butler App. No. 82-11-0109 (April 27, 1983), unreported, 1983 WL 4353. Furthermore, a deceptive act “has the likelihood of inducing a state of mind in the consumer that is not in accord with the facts.” *McCullough v. Spitzer Motor Ctr.*, Cuyahoga App. No. 64465, 1994 WL 24281 (Jan. 27, 1994). Thus, a plaintiff who could not have been deceived by a defendant’s conduct cannot prevail on a CSPA claim as a matter of law. *Cicero v.*

*Am. Satellite, Inc.*, 10<sup>th</sup> Dist. No. 10AP-638, 2011-Ohio-4918, ¶19.

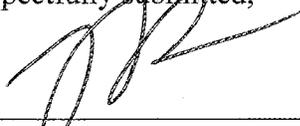
The facts of this case show no deceptive act on the part of Farmers. Farmers merely adjusted a claim according to the terms of the insurance contract with the Dillons. Not only was clearly spelled out in the insurance contract, Mr. Dillon was also told about the use of non-OME parts at the time of the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

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

**CONCLUSION**

Accordingly, OACTA urges the Court to reverse the order of the Fifth District Court of Appeals.

Respectfully submitted,



---

Jamey T. Pregon (0075262)  
[Jamey@dinklerpregon.com](mailto:Jamey@dinklerpregon.com)  
Lynnette Dinkler (0065455)  
[Lynnette@dinklerpregon.com](mailto:Lynnette@dinklerpregon.com)  
DINKLER PREGON LLC  
2625 Commons Blvd., Suite A  
Dayton, OH 45431  
(937) 426-4200  
(866) 831-0904 (fax)  
*Counsel for Amicus Curiae, Ohio Association of  
Civil Trial Attorneys*

**Proof of Service**

I certify that a copy of this Brief was sent by ordinary U.S. mail to the following counsel on July 14, 2014:

James R. Skelton, Esq.  
309 Main Street  
Coshocton, Ohio 43812

Matthew J. Smith  
Thomas F. Glassman  
Andrew L. Smith  
**Smith, Rolfes & Skavdahl Co., LPA**  
600 Vine Street, Suite 2600  
Cincinnati, Ohio 45202



---

Jamey T. Pregon (0075262)