ORIGINAL

In the Supreme Court of Ohio
CASE NO. 2014-14-0451

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

JERRY DILLON, et al.
Plaintiffs-Appellees.

vs.

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

BRIEF ON THE MERITS OF PLAINTIFFS-APPELLEES, JERRY DILLON, ET AL.

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I. STATEMENT OF THE FACTS

Jerry Dillon met a deer with his two-year-old Mercury Milan, which prompted him to turn in a claim to Farmers Insurance of Columbus, Inc. ("Farmers"). (R. 24, Deposition of Jerry Dillon, p. 17). Dillon contacted Mission Auto Connection, Inc. ("Mission Auto") to take the Milan to its repair facility, where repairs could be performed if Farmers did not elect to declare the vehicle a "total loss". (R. 24, p. 12) Mission Auto prepared a written estimate for repair calling for the use of only original equipment manufacturer ("OEM") parts.

OEM parts are those parts that are made by the auto-maker (in this case Ford/Mercury) for installation on a vehicle when it is being produced. These parts are produced according to the auto-maker's rigorous engineering and design specifications and are made from unique stamping dies, metals, and materials established by the manufacturer to enable the vehicle to meet federal safety and fuel efficiency standards.[1]

Farmers' employee, Mark Babb ("Babb"), inspected the damaged vehicle at Mission Auto and prepared a written estimate to repair the Dillons' Milan calling for the use of numerous non-OEM (original equipment manufacturer) replacement parts ("aftermarket parts"). Babb did not give the Dillons a copy of the estimate, and he failed to get Dillon's signature on the estimate permitting the use of these parts. (R. 24, p. 32).

Contrary to Farmers' depiction in its statement of facts that these non-OEM parts are "aftermarket vehicle parts built in accordance with OEM standards and procedures, but manufactured by third parties", these replacement parts are primarily made by Asian companies that have attempted to cheaply copy the auto-makers' parts, without permission. They are not made with the same stamping dies, often not made of the same metal or material as the OEM

[1] Genuine Ford Crash Parts v. Non-OEM, October 7, 2010, https://www.youtube.com/watch?v=Hywvw-hKZGA

parts, and are certainly not made per OEM standards and procedures.[2] These parts are also not subject to government crashtesting and the National Highway Traffic Safety Administration cannot effectively recall defective aftermarket parts.[3]

In a conversation with Dillon, Baab merely told him that his auto insurance policy allowed Farmers to consider aftermarket parts. Babb did not explain what aftermarket parts were, tell Dillon which specific parts Farmers was considering including for the repair, why it was proposing non-OEM use, or give Dillon an opportunity to discuss whether he approved the use of non-OEM parts prior to creating an estimate. (R. 22, Deposition of Mark Baab, p. 16). Instead, Baab bypassed Dillon completely and handed Farmers' estimate directly to the personnel at Mission Auto. (R. 22, p. 39). After conversing with Mission Auto and discovering the specific non-OEM parts Farmers proposed using in the two year-old Milan's repair, Dillon told the collision repair facility to repair his Milan using only OEM parts as recommended in Mission Auto's estimate. (R. 24, pp. 3-10) Farmers refused to pay for the difference between the aftermarket parts listed on its estimate and the actual invoice from Mission Auto for the repairs to the Milan.

Jerry and Nancy Dillon filed this lawsuit against Farmers in Coshocton Municipal Court alleging, among other counts, that Farmers violated the provisions of Ohio Revised Code ("ORC") § 1345.81 that require insurers to disclose to the vehicle owner the proposed use of non-OEM parts in a written estimate and to obtain that individual's signature approving the use of those parts in the repair. The trial court granted the Dillons summary judgment on their fourth

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[2] "Toby Chess Has Some Questions on Aftermarket Parts", *Auto Body Repair News*, September 12, 2012) http://www.searchautoparts.com/abrn/collision-repair/toby-chess-has-some-questions-aftermarket-parts?cid=95887.)

[3] "MOTOR VEHICLE SAFETY: NHTSA's Ability to Detect and Recall Defective Replacement Crash Parts is Limited", *Government Accountability Office*, January 2001, GAO-01-225 ("GAO Aftermarket Parts Report"), p. 6, *http://www.gao.gov/assets/240/231055.pdf)*

case of action alleging Farmers violated ORC § 1345.81. The Municipal Court then held a damages hearing. The parties stipulated that the Dillons had suffered actual damages in the amount of $1,521.07. In addition to the amount of actual damages stipulated, the trial court awarded the Dillons treble damages of $4,563.21 and legal fees and expenses of $24,529.38.

Appellant appealed arguing that ORC § 1345.81 cannot apply to insurers -- despite the specific language of the statute -- and disputing the award of actual damages, treble damages and legal fees and expenses. The Fifth District Court of Appeals determined that the provisions of ORC § 1345.81 specifically defining insurers, applying the requirements of the statute to them, and subjecting them to penalties available for violations could not be reconciled with provisions of ORC § 1345.01 generally exempting those engaged in the business of insurance from provisions of the Consumer Sales Practices Act ("CSPA"). Accordingly, the Court of Appeals upheld the decision and confirmed the award of treble damages and legal fees and expenses, but overturned the award of actual damages in the amount of $1,521.07. The Court determined that the Dillons could not be awarded treble damages and actual damages together. Farmers has now appealed the Fifth District Court of Appeal's decision affirming the trial court's grant of summary judgment and the other damages awarded.

II. LAW AND ARGUMENT

RESPONSE TO PROPOSITION OF LAW NO. 1:

AN INSURER ENGAGES IN A "CONSUMER TRANSACTION" FOR PURPOSES OF THE OHIO CONSUMER SALES PRACTICES ACT WHEN ISSUING A REPAIR ESTIMATE ON A PRIVATE VEHICLE.

Farmers mischaracterizes this entire suit by arguing that this dispute centers around whether the installation of non-OEM parts in the Dillons' vehicle is permitted under their policy of insurance and merely involves an insurance policy dispute. Factually and legally, this matter has **absolutely nothing** to do with the Dillon's policy of insurance. Contrary to Farmers' assertions, this case is:

- Not about a policy of insurance;
- Not about the "adjusting" of a claim; and
- Not about "the business of insurance."

What this case is about:

- Ohio citizens' right to be informed about their proposed motor vehicle repairs;
- Ohio citizens' right to choose the types of parts for their vehicle repairs;
- Ohio citizens' right to question the safety of uncrashtested, cheaper vehicle parts; and
- Ohio citizens' right to hold accountable a party trying to deprive them of these rights.

This is truly a straightforward case. A company failed to comply with a specific statutory requirement that expressly applied to it. It was held liable for damages and other penalties per the provisions of that statute and related statutes. While it enjoyed a general exemption from the

application of the laws contained in that statutory chapter for its ordinary business activities, one statute overtly and expressly applied to the company for engaging in specific acts.

Thus, by making a particular act, the writing of a motor vehicle repair estimate calling for aftermarket parts, subject to the consumer protection law (even if written by an insurer), the Ohio Legislature clearly demonstrated that issuing repair estimates for personal vehicles involves a consumer transaction. If the Legislature believed the act of issuing vehicle repair estimates for personal vehicles to be the "business of insurance", it would have placed the compliance requirements in the statutory chapter governing insurance.

Even if this Court were somehow persuaded that an insurer's act of issuing a collision repair estimate on a damaged personal motor vehicle was the business of insurance, the Court would still have to consider the undeniable conflict created between the general provisions of ORC § 1345.01 and ORC § 1345.81. Ohio's statutory construction requirements and case law plainly demonstrate that ORC § 1345.81 prevails. As a result, Farmers is subject to comply with the requirements of ORC § 1345.81.

A. THE OHIO LEGISLATURE PLACED THE AFTERMARKET PARTS STATUTE IN THE CSPA AND MADE INSURERS ACCOUNTABLE FOR WRITING COLLISION REPAIR ESTIMATES PROPOSING THEIR USE.

There has been a long history of debate and concern over the propriety of using non-OEM parts in the repair of personal motor vehicles. Because of concerns about the quality and safety of these parts, the Ohio Legislature enacted ORC § 1345.81 to ensure that Ohio citizens would be informed about any proposed use of non-OEM parts in the repair of their vehicles and have the opportunity to consent to the use of such parts. Since the enactment of ORC § 1345.81, concerns over the safety implications of non-OEM parts usage and their lack of quality have only

increased. In 2010, the Certified Aftermarket Parts Association, an entity created by the insurance industry to set quality standards for non-OEM parts, admitted that "[i]n testing what appear on the surface to be reasonably well-manufactured aftermarket bumpers, our laboratories **discovered serious deficiencies in mechanical properties such as strength and metal hardness, material thickness, and fit. These deficiencies potentially place the driving public, who trust body shops to repair their vehicles with safe quality parts, at serious risk.**'" "CAPA to Establish New Certification Standard for Aftermarket Bumpers", CAPA News Release, February 1, 2010, http://www.capacertified.org/press/100201.pdf (emphasis added)

Contrary to Farmers' assertions, this case is not about the terms of the Dillon's insurance policy. No one disputes the language of the policy. However, it is one thing to put language in a form insurance policy that the cost of non-OEM parts might be considered; and something else entirely for Farmers to write a collision repair estimate demanding the use of multiple non-OEM parts (some of which, like the non-OEM hood and bumper assembly, impact safety) in the repair of this specific vehicle, the Dillons' severely damaged Milan. It is further unreasonable for Farmers to claim it has no resposibility to comply with the aftermarket parts statute, when it writes an estimate for a consumer's vehicle repairs, and does so without any accountability as to the safety and propriety of actually installing those designated parts in this collision repair or any meaningful discussion with the vehicle owners about their use. This is not an "insurance" case, but is a consumer vehicle repair matter that falls squarely under the "CSPA".

Farmers fails to explain how the Legislature could NOT have **intended** for this statute and its remedies to apply to insurers writing collision repair estimates. It simply asserts that it cannot apply because it is an insurer. This is fatally incorrect.

1. An Insurer Loses Its General Exemption From The CSPA When Engaged In Activities Outside Of The "Business Of Insurance"

ORC § 1345.01(A) generally defines what constitutes a "consumer transaction" for purposes of the CSPA. This definition generally excludes transactions for certain types of business activities, including those by companies engaging in the business of insurance. ORC § 5725.01(C).

While insurers enjoy a general exemption from the CSPA, they lose that exemption when they engage in activities outside of the "business of insurance". In *Thornton v. State Farm Mut. Auto Ins. Co, 2006 U.S. Dist., LEXIS 83968 (N.D. Ohio Nov. 17, 2006)(applying Ohio law)*, the court rejected the argument that every action in which an insurer engages is exempted from the CSPA. Instead, the court agreed with the consumer finding "[t]his insurance company exception does not provide a blanket exemption for all activities conducted by an insurance company. Rather, the Court must make a practical inquiry into whether [the insurer] was actually operating as an insurance company **in the transaction at issue**." *Id.* at 25 (emphasis added). As a result, the federal district court refused to grant the insurer's motion to dismiss the CSPA claim alleging the insurer violated the CSPA by selling a vehicle it had declared a total loss without first obtaining a salvage title as required by Ohio law. *See Hofstetter v. Fletcher, 905 F.2d 897, 906 (6th Cir. 1988)*(applying Ohio law)(insurance policy sales not exempted from CSPA when sold as part of package of services).

Farmers inaccurately cites to *Drozeck v. Lawyer Title Ins. Co., 140 Ohio App. 3d 816, 821, 749 N.E.2d* 775, 779 (Cuyahoga Cty. App. 2000), as standing for the proposition that insurers cannot be subject to the CSPA. In fact, the *Drozek* court was skeptical of the insurer's argument that it was blanketly exempted from the CSPA. As the court stated, "[w]hile Lawyers

Title claims that it is exempt from the OCSPA because it is in the business of selling "title insurance" as defined by R.C. 3935.01(A), it has not explained how acting in the capacity as an admitted escrow agent is "in substance equivalent" or "substantially amounting to" engaging in the insurance business." *Id.* The actual basis upon which the Eight District Court of Appeals dismissed the CSPA claim was that plaintiff's claim was barred by the CSPA's statute of limitations.

Thus, insurers enjoy an exemption to the application of the CSPA **only** to the extent that Ohio is already regulating the specific activity involved as the "business of insurance." Otherwise, insurers would be free to engage with impunity in consumer injurious activities not specifically regulated by Ohio as the business of insurance, and for which there would be no remedy.[4] As the court in *Weber v. State Farm Mut. Auto. Ins. Co.,* CV 2005 1227, at *6 (Allen Cty. Cm. Pl., August 10, 2006)(annexed hereto), stated when denying State Farm's dispositive motion claiming it could not be liable under the CSPA for its acts, "[a]n insurance company may not simply skirt around consumer protection laws by engaging in business outside of its regulated and excepted industry. When the legislature promulgated laws regulating the insurance industry it did so with the intention of regulating the business of insurance and insurance transactions – this entails agreements between the insurance company and its insured, not the insurance company's business practices aimed at increasing revenue."

[4] An entity that is exempt under a statute subjects itself to liability for activities that fall outside of its exemption. In *Glouster Community Bank v. Winchell,* 103 Ohio App.3d 256, 659 N.E.2d 330 (Athens Cty App. 1995), the court held that a bank was subject to the requirements of the Retail Installment Sales Act, ORC §1317.01 *et. seq.,* when it sold a mobile home it had previously repossessed to a consumer. Although the bank enjoyed a statutory exemption from the application of the Retail Installment Sales Act, when it stepped outside of the activities for which the exemption was created, it rendered itself subject to the act.

Ohio law does not define what constitutes the "business of insurance". The United States Supreme Court has long-standing precedent determining what activities constitute the "business of insurance".

2. The Business of Insurance Involves a Narrow Set of Activities and Does Not Encompass All Activities in Which an Insurer May Engage

To enable insurers to continue aggregating their claim and loss information to obtain greater statistical relevancy for the purpose of rate-making and setting premiums (which otherwise contravened the federal antitrust laws), and to ensure that states could continue regulating insurers, Congress passed the McCarran-Ferguson Act ("MFA"). The MFA, 15 United States Code ("U.S.C.") §1011 *et seq.*, expressly authorizes states to regulate insurers and precludes the application of the federal antitrust laws over insurance activities to the extent the activity is specifically being regulated by a state as the business of insurance.[5] Thus, if a state is not 1) regulating a specific activity and 2) doing so as the "business of insurance", the fact that *an insurance company* is engaged in the activity is irrelevant and does not exempt the insurer from the application of the federal law.

In *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (U.S. 1982), the United States Supreme Court specifically identified a three prong test for determining whether an activity was the business of insurance: "first, whether the practice has the effect of transferring or spreading a

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[5] 15 U.S.C. § 1012 states:
(a) State regulation. The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
(b) Federal regulation. No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act [15 USCS §§ 1 et seq.], and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended [15 USCS §§ 41 et seq.], shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry." *See also, Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (U.S. 1979).

Farmers' argument that issuing a vehicle repair estimate for the repair of the Dillons' vehicle somehow falls within the business of insurance is entirely specious. Writing an estimate proposing how a person's motor vehicle should be repaired and with what parts does not transfer or spread the Dillons' risk; the estimate is not an "integral part of the policy relationship" between Farmers and the Dillons; and the activity is not exclusively limited to insurers. As the U.S. Supreme Court has found, the "business of insurance" does not encompass all activities in which an insurer may engage – including arrangements to provide goods and services to insureds at reduced cost. *Royal Drug Co.*, 440 U.S. at 232-233.

In *Royal Drug Co.*, the U.S. Supreme Court considered the question of whether contracts insurers entered into with preferred pharmacies to supply insureds with drugs at reduced rates constituted the "business of insurance" to exempt these agreements from the application of the antitrust laws. In its decision, the high court held that arrangements between insurers and suppliers of goods and services to insureds did **not** constitute the business of insurance, despite the likelihood that such contracts might serve to reduce insurer costs, might be passed on to insureds as premium savings, and, thus, might be construed as impacting the insurer-insured relationship. In its decision, the U.S. Supreme Court stated, "[i]f agreements between an insurer and retail pharmacists are the "business of insurance" because they reduce the insurer's costs, then so are all other agreements insurers may make to keep their costs under control -- whether **with automobile body repair shops** or landlords. Such agreements would be exempt from the

antitrust laws if Congress had extended the coverage of the McCarran-Ferguson Act to the 'business of insurance companies.' But that is precisely what Congress did not do." *Id.* at 232-233(emphasis supplied).

The U.S. Supreme Court makes overt distinction between the "business of insurance" and the "business of insurance companies". It, likewise, defines that auto collision repair matters in which an insurer might involve itself is not an exempted activity as those activities are not part of an insurer's core business. The business of insurance does not even include, as the *Pireno* court held, an insurer's use of a medical peer review panel to help the insurer determine how much an insured was owed under the policy. Thus, the "business of insurance" does not encompass all actions of insurance companies, nor every scheme the insurer has developed to control costs -- like writing collision repair estimates dictating parts to be used in the repair of an insured's damaged vehicle.

3. The Ohio Legislature Made the Writing of Collision Repair Estimates an Activity Subject to the CSPA

The Ohio Legislature charged the Ohio Department of Insurance to regulate the "business of insurance"[6]. The Legislature did not give exclusive jurisdiction to the Insurance Department for every activity in which an insurer might engage.

The act of writing a motor vehicle repair estimate proposing how a vehicle should be repaired and with what type of parts is indisputably a motor vehicle repair activity. It is not an insurance activity. Nowhere in ORC Title 39 nor in the Ohio Administrative Code ("OAC") 3901-1-01 *et seq.* is an auto insurer required to issue a collision repair estimate. Conversely, motor vehicle repairers are required to notify people they have the right to receive an estimate

[6] *See ORC §3901.15:* "The laws relating to the superintendent of insurance apply to all persons, companies, and associations, whether incorporated or not, engaged in the business of insurance."

and must provide a written estimate as requested. OAC 109: 4-3-13. Accordingly, the act of issuing a vehicle repair estimate on a personal vehicle is clearly an act that the Ohio Legislature has placed squarely in the CSPA, and it is NOT an activity Ohio's legislative scheme has designated as an insurance activity within the exclusive jurisdiction and purview of the Ohio Department of Insurance.

ORC §1345.81 expressly states:

> **(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.

Accordingly, the Ohio Legislature perceived the providing of an estimate for the repair of a motor vehicle proposing non-OEM parts to be an activity involving consumer transactions and not the business of insurance – irrespective of the party issuing the estimate.

Farmers cannot reasonably argue that issuing a collision repair estimate is an integral part of the business of insurance as only a short while ago auto insurers would instruct people to obtain three repair estimates and then decide to pay based on the lowest one. Some insurers have recently decided they can increase profits and minimize costs by issuing their own repair

estimates. Having operated successfully for decades without ever writing a motor vehicle repair estimate, that activity cannot be a core part of the business of insurance.

Moreover, when insurers had people obtain and submit three or more estimates for repairs, those estimates were written by licensed/registered[7] professional collision repairers who had direct, day-to-day, hands-on experience with actually repairing collision damaged motor vehicles. Professional repairers have the required hands-on knowledge and skill to know whether using certain non-OEM parts or repair techniques would be appropriate or would compromise the safety or crashworthiness of the vehicle. Farmers does not. Professional repairers are also the persons legally accountable for properly and safely repairing a motor vehicle. Farmers is not. In fact, with its new-found incentive for writing repair estimates, there is nothing to prevent Farmers from writing an estimate calling for the repair of a vehicle entirely with non-OEM and junkyard parts and adhering the remainder of the vehicle together with superglue and twine. This is a patently absurd scenario, yet one that could occur without any legal penalty if this Court were to buy Farmers' argument that writing a collision repair estimate is an insurance activity.

Farmers cannot escape the facts that: 1) nowhere in the Ohio insurance statutes or regulations is an insurer **required** to create an estimate proposing the method and parts to be used in the repair of a motor vehicle; 2) everyone engaged in the business of repairing personal motor vehicles is **required by law** to provide notice that a person seeking repairs is entitled to an estimate and must provide that estimate as requested; and 3) providing a detailed repair estimate for a severely damaged vehicle calling for the use of specific parts and attempting to solicit and

[7] Anyone who repairs collision damaged motor vehicles for payment is required by Ohio law to be licensed as part of a new or used motor vehicle dealership or otherwise registered as a collision repair facility under ORC § 4775.01 *et seq.*

direct business to companies selling those parts has **nothing** to do with activities exclusively regulated by the Ohio Department of Insurance.

4. Farmers Is A Supplier In A Consumer Transaction

In this matter, Farmers determined that the Dillons' Milan was only a partial loss and presumptively capable of being repaired. Accordingly, the Dillons needed to have their vehicle repaired and had previously had the Milan taken to Mission Auto, from whom they had requested a repair estimate. As a result, the request for a written repair estimate had already been made when Babb inspected the damaged vehicle at Mission Auto. Both Farmers and Mission Auto prepared a written repair estimate proposing how the vehicle could be repaired. Only Farmers' estimate called for the use of non-OEM parts.

What cannot reasonably be disputed is that the repair of the Dillons' Milan was a "consumer transaction" as defined by ORC § 1345.01 and anyone proposing how that repair could be performed was soliciting a consumer transaction. While Farmers seeks to distance itself from this consumer transaction by claiming that it did not tell the Dillons where to have their vehicle repaired and did not, itself, repair the vehicle, these do not absolve Farmers from having engaged as a supplier in soliciting and effecting a consumer transaction.

ORC § 1345.01(C) defines a supplier for CSPA purposes as "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." In this matter, Farmers acted as a supplier by writing a collision repair estimate proposing how a vehicle be repaired, requiring the use of non-OEM parts, directing the purchase of those parts from specific companies listed on pages 8 and 9 of its estimate, telling the collision repairer the specific

actions it had to take if Farmers' estimate included a NAPA part[8], and instructing the collision repairer that it could not engage in repairs without Farmers' approval.[9]

Most significant, however, is Farmers' failure to give the estimate it prepared to the Dillons. Instead, Farmers admits that it bypassed the Dillons entirely and gave the estimate detailing how the vehicle should be repaired directly to Mission Auto. The only reason for Farmers to give the repair estimate to the collision repairer was to tell Mission Auto how Farmers expected it to repair the Dillons' vehicle. Farmers' estimate contains numerous instructions to the collision repair facility on actions the repairer "must take", where it is to buy non-OEM replacement parts, and that Farmers has to authorize any repairs before they can be made.

Farmers relies on this Court's recent decision in *Anderson v. Barclay's Capital Real Estate, Inc.*, 136 Ohio St. 3d 31, 35, 989 N.E.2d 997, 1000, 2013-Ohio-1933, ¶ 14 (Ohio 2013) in its assertion that it did not engage in a consumer transaction, is not a supplier, and cannot be held accountable under the CSPA. *Anderson* is distinguishable from this matter and actually supports the Dillons position that Farmers is a supplier in a consumer transaction.

Anderson involved the question of whether mortgage service providers that handled borrowers' payments on real estate mortgage loans on behalf of financial institutions were subject to the CSPA. This Court determined those providers were not subject to the CSPA for two essential reasons. First, the activities of the mortgage services were not a "consumer transaction" as they were provided to the financial institutions (not to the borrowers) and were services directly adjunct to a CSPA exempt activity -- the sale of real estate. Second, the

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[8] "If the above estimate includes a NAPA part price, the repair facility must complete a one time set up with their local NAPA retailer in order to receive the special "Farmers Preferred Parts Program" pricing." (R. 22, Exhibit 1, p. 6)

[9] "ALL SUPPLEMENTS MUST BE APPROVED BY A CI.AIMS REPRESENTATIVE BEFORE REPAIRS ARE COMPLETED" (R. 22, Exhibit 1, p. 6)(capitals in original)

mortgage services were not "suppliers" under the CSPA as they were not effecting or soliciting the transfer of goods or services to consumers. Instead they were merely receiving and applying payments due on a CSPA-exempt real estate transaction as the financial institutions could do themselves without incurring CSPA liability.

The Dillons' matter is entirely different. The consumer transaction here is the repair of the Dillons' motor vehicle which entailed both goods (parts) and services (skilled labor). Farmers was a supplier under the CSPA as it solicited the sale of non-OEM parts to Mission Auto and the Dillons in the repair of the Milan and sought to control how repairs were effected.

> The terms "effecting" and "soliciting" are not defined by [ORC § 1345.01(C)], so we give the terms their plain and ordinary meanings.
>
> "Effect" is defined as "[t]o bring about; to make happen." ***Black's Law Dictionary*** at 592. "Solicitation" is defined as "[t]he act or an instance of requesting or seeking to obtain something; a request or petition." ***Black's*** at 1520.

Anderson, 136 Ohio St. 3d at 38, 989 N.E.2d at 1003, 2013-Ohio-1933 at 30. Farmers strove to have specific non-OEM parts utilized in the Dillons' vehicle repair (a consumer transaction), identified those preferred vendors from whom the parts could be purchased, and gave instructions to the collision repairer about needing to inspect and approve any repairs before they were permitted to be made. Clearly, by writing the collision repair estimate, Farmers both solicited goods to be sold in a consumer transaction and attempted to effect how repairs would actually performed.

Farmers curiously argues that "Farmers was never going to perform the repairs or control whether or how the work was to be performed." (Merit Brief of Appellant ("Merit Brief"), p. 13.) Yet, Farmers absolutely sought to control how the repair work was to be performed and instructed Mission Auto it had to receive Farmers permission prior to making repairs. It then

argues, "[a]t 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 the 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 [sic] chose." (Merit Brief, p 14)

This argument has no merit. There is zero evidence in the record that Babb **ever** offered the Dillons a check in payment of the loss. Instead, Babb wrote an estimate for how he thought the vehicle should be repaired and gave it to the collision repairer. He didn't even give it to the Dillons to demonstrate, what Farmers now tries to contend was merely for, a purpose "limited to establishing the amount owed." (Merit Brief, p. 14) Rather, Babb gave the estimate to Mission Auto which contained instructions for the collision repairer to effect repair with non-OEM parts, sourced those parts from specific companies, and involved itself in the repair itself by requiring repeated inspections so it could approve the repairs -- exactly as set out in the estimate instructions to the collision repairer. (Merit Brief, p. 2, citing R. 20, Babb Affidavit, ¶¶ 11-12) Farmers even characterizes its initial payment to Mission Auto as one for "agreed upon repairs" and notes that it paid "for subsequent repair work related to the accident." (Merit Brief, p. 2)

Accordingly, Farmers was a supplier engaged in a consumer transaction promoting the repair of the Dillons' personal vehicle with parts made by certain companies and sold by distributors designated on its repair estimate. Farmers was also directly involved in effecting the repairs to the Dillons' Milan by inserting itself into the motor vehicle repair transaction and instructing Mission Auto how to fix the vehicle. Unquestionably, Farmers was engaged as a supplier in a consumer transaction that subjected it to the application of the CSPA.

B. SUBJECTING INSURERS VIOLATING ORC § 1345.81 TO CSPA DAMAGES IS IN KEEPING WITH THE REMEDIAL NATURE OF THE ACT

Farmers argues that the remedies available under the CSPA should not be permitted in this case as it would produce an unreasonable or absurd consequence. One might ask why applying the full provisions of the CSPA to Farmers produces an unreasonable or absurd consequence but does not when applied to tiny collision repair entities like Mission Auto or even large ones like the Sterling chain of repair shops – which until earlier this year was owned by Allstate Insurance[10]. As evidence of such, Farmers points to the damages awarded and affirmed by the Fifth District Court of Appeals as supporting an absurd result.

There is no absurd result. The trial court held Farmers accountable and awarded available remedies, just like those Mission Auto would have faced had it engaged in the same conduct, failed to properly inform the Dillons of the proposed use of non-OEM parts and failed to obtain their express approval for their use. Farmers simply seeks to be shielded from the consequences of its own acts – which could easily have been avoided by providing the required notice and obtaining consent. Farmers' assertion that the Dillons should be precluded from obtaining the remedies available under ORC §1345.09 undermines the very purpose and intent of the CSPA. As this Court has identified, the CSPA is a remedial law which requires courts to liberally construe its provisions to promote substantial justice. *Einhorn v. Ford Motor Co.*, 48 Ohio St. 3d 27, 29, 548 N.E.2d 933 (Ohio 1990).

Amicus Curiae, Ohio Association of Civil Trial Attorneys, rather hysterically argues that upholding this decision will open the floodgates to "bloated attorney fee awards" and will

[10] "Service King to Acquire Sterling Autobody Centers, April 14, 2014, http://www.fenderbender.com/FenderBender/April-2014/Service-King-to-Acquire-Sterling-Collision-Centers.

"dramatically increase exposure for insurers" and "damage will be done to the [insurance] industry" similar to the "reign of *Scott-Ponzer*". This, of course, is nonsense.

ORC § 1345.81 has been in force for over twenty years. Yet, there has not been a single reported decision holding either an insurer or collision repairer liable for failing to comply with the provisions of the statute. There has been no "bonanza" of CSPA claims and there is unlikely to be one, as both insurers and collision repairers can safeguard against exposure by complying with the requirements of the statute. In fact, this case would not exist if Farmers and Babb had not deliberately violated ORC § 1345.81. Whether insurers are subjected to the remedial provisions of the CSPA for violating ORC § 1345.81 is entirely within their own control and can be easily avoided.

C. WHEN STATUTES ARE IN CONFLICT THE SPECIFIC PROVISIONS ENACTED LATER IN TIME PREVAIL OVER GENERAL PROVISIONS OF AN EARLIER DATE

Even if this Court were to determine that Farmers was somehow engaged in an activity constituting the "business of insurance", this Court would need to address the obvious conflict that exists between the general exemption for insurers contained in ORC § 1345.01 and the Legislature's very specific inclusion of insurers in ORC § 1345.81

The rules of statutory construction, as set forth by the Legislature in ORC §§ 1.12, 1.51, and 1.52, establish that if a court cannot give full effect to conflicting statutory provisions, specific statutes take precedence over general ones, and more recently enacted statutes prevail over older ones.[11] Additionally, remedial laws must be liberally construed for the purpose of

[11] *Summerville v. City of Forest Park,* 128 Ohio St. 3d 221, 227 (Ohio 2010) (*citing, Davis v. State Personnel Bd. Of Review,* 64 Ohio St.2d 102, 105 (1980))

ensuring justice is done.[12] The Ohio Supreme Court has determined that, "[t]he Consumer Sales Practices Act is a remedial law which is designed to compensate for traditional consumer remedies and so must be liberally construed pursuant to R.C. 1.11."[13]

In *Burdge v. Kerasotes Showplace Theatres, LLC*[14], the Court had to consider and determine the prevailing statute relating to conflicting general versus specific provisions of the CSPA similar to those at issue here. In its determination, the court found that the specific requirements of ORC § 1349.18 (part of the Ohio Credit Card Recording Act that is tied to the CSPA) prevailed over the general provisions of ORC §§ 1345.01 and 1345.09. The same reasoning is applicable in this matter where the specific inclusion of insurers in ORC § 1345.81 and the mandates imposed upon them under that provision must take precedence over the general provision otherwise exempting insurers from provisions of the CSPA in ORC §1345.01.

ORC § 1345.81(A)(5) states, "'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." The statute further mandates that:

> (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 * * *:
>
> (1) If the person requesting the repair[15] chooses to receive a written estimate, the insurer, * * * providing the estimate shall identify, clearly in the written estimate, each non-OEM aftermarket crash part * * *. **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.

ORC § 1345.81(emphasis added.)

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[12] "Remedial laws and all proceedings under them shall be liberally construed in order to promote their object and assist the parties in obtaining justice." ORC § 1.11

[13] *Einhorn v. Ford Motor Co.*, 48 Ohio St. 3d 27, 29 (Ohio 1990).

[14] *Burdge v. Kerasotes Showplace Theatres, LLC,* 2006 Ohio 4560, P56-P57 (Ohio Ct. App., Butler County Sept. 5, 2006).

[15] "Person requesting the repair" is the simple phrase the Legislature used to reflect the different status of potention persons in need of vehicle repair. That person might be an owner, lessee, or relative, friend, nanny, etc. of either who had the legal right to utilize the vehicle.

ORC § 1345.81, therefore, is directed at obtaining consumers' informed consent about the type of motor vehicle parts that will be used in the repair of the their motor vehicles. The legislative history of the enactment of this statute clearly demonstrates that law makers were concerned about non-original equipment parts being promoted in collision repairs by the insurance industry and sought to ensure that individuals were well aware of the intended use of such parts and gave their written consent for that use.[16] By expressly including insurers in this statute, the Ohio Legislature plainly intended it to apply to insurers and hold them accountable for violations as expressed in ORC § 1345.81(E) and the remedies available in the remaining sections of the CSPA. By placing this statute within the consumer protection law, and including insurers, the Legislature obviously did not believe that insurers trying to dictate the parts used in motor vehicle repairs were engaged in an activity that was exempted from the application of the CSPA.

Without doubt, the Ohio Legislature fully intended insurers to comply with the mandates of ORC § 1345.81. Without accepting that the Legislature perceived the activity of insurers writing estimates for motor vehicle repairs to be a "consumer transaction" subject to all available remedies under the CSPA, there could be no enforcement of the statute for the individual denied rights by an insurer under this section and there would also be no remedy. Instead, as occurred herein, the insurer would simply demand repairs with the use of the non-original equipment parts and hand the estimate to the collision repairer without any consideration given to the interests and of the person whose vehicle was being repaired.

As the Ohio Legislature expressly included insurers in a specific provision of the Consumer Sales Practices Act, it must have intended for all of the rights and remedies available

[16] Ohio Senate Highways & Transportation Committee Meeting Notes Agenda June 7, 1990 containing Memorandum of April 11, 1989.

to the individual contained within the CSPA to apply regarding an insurer's violation of that specific provision. There is no other way in which one can reconcile the obvious conflict between ORC § 1345.01 and ORC § 1345.81. Applying the rules of statutory construction, the later-enacted specific provisions of ORC § 1345.81 must prevail over the pre-existing general provisions of ORC § 1345.01. Likewise, as the CSPA is remedial in nature, its provisions must be liberally construed to ensure justice is done. For this Court to find, as Appellant argues, that the entirety of the CSPA cannot apply – including the aftermarket parts statute in which insurers are expressed named – would render substantial provisions of ORC § 1345.81 a nullity. That clearly cannot be what the Ohio Legislature intended, and the legislative history reflects that this is not the expected result.

The only way in which the conflicting provisions of the statutes can be given effect is to determine that ORC § 1345.81 is a specific provision intending to create an exception to the general exemption of insurance activities from the application of the CSPA. Accordingly, the Dillons urge this Court to affirm the decisions of the lower courts in this matter.

RESPONSE TO PROPOSITION OF LAW NO. 2:

AN INSURER'S ISSUANCE OF A REPAIR ESTIMATE FOR USE OF OEM AND NON-OEM PARTS IS A *PER SE* UNFAIR OR DECEPTIVE ACT OR PRACTICE WHEN ISSUED IN VIOLATION OF ORC 1345.81.

Farmers argues that the Dillons never chose to have a written estimate and were never deceived, confused or misled to allow for damages under the CSPA, and that its estimate complied with the terms of their policy. As previously stated, Farmers' policy language is irrelevant to this action and Farmers' estimate adhering to the terms of its policy does not permit it to violate the terms of a statute. *See, e.g. Moore v. State Auto. Mut. Ins. Co.,* 88 Ohio St. 3d

27, 28-29, 723 N.E.2d 97, 99, 2000-Ohio-264 (Ohio 2000), *superseded by statute on other grounds*.

Moreover, this is the first time Farmers has raised the arguments that the Dillons did not request a written estimate and were not deceived by Farmers' omission having neglected to do so both at the trial court level and at the Fifth District Court of Appeals. Farmers now asserts that the Fifth District Court of Appeals failed to address the inner-workings of the specific statute and failed to provide any guidance as to the application of ORC 1345.81 for insurers to rely upon. The Fifth District Court of Appeals never addressed the issue of the Dillons choice of repair estimate or whether the Dillons were deceived or misled as Farmers never raised these issues. Farmers' attempt to raise them for the first time in front of the Ohio Supreme Court is improper and should not be considered. Nonetheless, these arguments have no merit.

A. FARMERS UNILATERALLY SELECTED THE FORM OF REPAIR ESTIMATE TO PROVIDE WITHOUT IMPUT FROM THE DILLONS

Farmers seeks to convince this Court it can avoid the requirements of ORC 1345.81 by unilaterally issuing a written repair estimate without giving the Dillons the opportunity to select the type of estimate. Farmers unilateral action cannot be used as an excuse to avoid the requirements of the ORC § 1345.81. As one court recently found:

> Appellant cannot avoid the penalty of failing to comply with R.C. 1345.81 by simply issuing a written estimate before appellee had the opportunity to request it. Further, in this case, appellee requested appellant pay for the repairs to her vehicle which, according to [the insurer's] testimony, is synonymous to requesting the issuance of the estimate.

Bigelow v. Am. Family Ins., 2014-Ohio-2945, ¶ 26 (Ct. App. 2014)

The same facts hold true in this case. The Dillons sought payment for their vehicle repairs and Farmers automatically issued a written estimate. To allow Farmers to avoid the requirements of ORC 1345.81 by usurping the right of the vehicle owners to decide what

estimate they preferred is contrary to public policy and the remedial nature of the CSPA. As this Court recently declared, "[t]he CSPA is remedial in nature, having been designed to compensate for incomplete consumer remedies available at common law. Thus, we must liberally construe the statute in favor of the consumer." *Anderson*, 136 Ohio St.3d at 34, 989 N.E.2d at 1000, 2013-Ohio-1933, ¶ 9 (internal citations omitted.) If this Court allowed Farmers to avoid responsibility for complying with the requirements of the statute by simply ignoring the vehicle owners, the Court would abet Farmers in circumventing the very purpose of the statute -- informed consent.

B. FARMERS ENGAGED IN A *PER SE* UNFAIR OR DECEPTIVE ACT OR PRACTICE AND THE DILLONS STATE OF MIND WAS IRRELEVANT.

Farmers now argues that, although it utterly failed to comply with the requirements of ORC § 1345.81, the Dillons cannot recover because they were never "deceived". This argument is ill-conceived as the specific language of ORC § 1345.81 finds that the failure to obtain the signature on a written estimate calling for the installation of non-OEM parts on a consumer's vehicle is an unfair or deceptive act or practice *per se*. Because the failure to obtain the Dillons' informed consent regarding non-OEM parts is defined by statute as an inherently unfair or deceptive act, the belief of the Dillons is not a necessary element of the cause of action.

Even if this Court determined that the Dillons' state of mind was relevant to the action, Farmers only offered Babb's self-serving statement that Dillon was "well aware" of the differences between aftermarket parts and auto-maker parts. (Merit Brief p. 2, citing R. 22, p. 24) On this basis Farmers argues Dillon was never "deceived."

Farmers, however, offers no evidence demonstrating that Dillon knew of the controversy over the propriety of using non-OEM parts in consumers' vehicle repairs, where these parts were

made and who would warrant the parts, the ongoing concern over safety failures and lack of quality between these parts and their auto-maker counterparts, the lack of crashtesting, the possible use of entirely different materials in them from the auto-makers' parts, and NHTSA's inability to recall defective non-OEM parts or to identify defects in non-OEM parts in the first place. This is the type of information necessary for a consumer to understand regarding non-OEM parts before being accurately described as "well-aware" of the differences with the auto-maker's parts to support a claim he was not deceived. "The [CSPA] reflects legislative concern that, as marketing and consumer services become more complex and sophisticated, they increasingly exceed the capacity of consumers to make informed choices in the face of deceptive practices by a sophisticated seller operating in his field of expertise." *Roelle v. Orkin Exterminating Co.*, 2000 Ohio App. LEXIS 5141, 18, 2000 WL 1664865 (Ohio Ct. App., Franklin County Nov. 7, 2000. Here, there is a massive distinction between knowing that aftermarket parts are not made by the manufacturer of your automobile and being informed that these parts can include, as identified by CAPA, material deficiencies that may potentially place the driving public at serious risk.

Additionally, although Farmers claims Dillon was well-informed about non-OEM parts, it also tells this Court that during the initial conversation between Babb and Dillon, "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." (Merit Brief p. 1)(emphasis in original) Farmers also asserts that "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", but that "Mr. Dillon later spoke with Mr. Babb, and changed his mind, without explanation, demanding Farmers pay for the installation of purely OEM parts." (Merit Brief , p. 2).

If Dillon was as knowledgeable about the differences between OEM and aftermarket parts and as adamant about not having his vehicle repaired with these imitation parts as Farmers now claims, Dillon would have told Babb from the beginning that he only wanted OEM parts used in the repair and certainly would never have initially agreed to have repairs performed with non-OEM parts. The only sensible explanation accounting for the facts Farmers sets forth is that Dillon learned from Mission Auto that Farmers wanted it to use aftermarket parts in the repair of the vehicle; and after being informed of the specific parts, including safety-related items, Farmers had written to be used, he refused consent. ORC § 1345.81 makes clear that the consumer must be told exactly which parts in the repair estimate are designated to be replaced with non-OEM parts. The basis is plainly because a person might have no concern about the use of certain non-OEM parts, but might be adamantly against the use of others, like those that can have an impact on safety. By failing to disclose to the Dillons exactly which non-OEM parts Farmers proposed for their vehicle's repair (and there were many), Farmers is precluded from asserting that the Dillons were never "deceived" because the Dillons simply did not know what non-OEM parts were identified by Farmers for the repair. As a result, the Court of Appeals correctly decided the issues and its decision merits being affirmed.

III. CONCLUSION

Farmers mischaracterizes this is as an insurance coverage dispute between an insurer and its policyholders and asserts that the CSPA does not apply to insurance disputes. This case has nothing to do with the Appellee's insurance policy. Rather, it is a case based solely upon the Ohio Consumer Sales Practices Act provision of ORC § 1345.81 and Farmers utter failure to comply with express terms of that statute.

Second, Farmers is clearly a supplier, solicited and participated in effecting a consumer transaction. By issuing a written repair estimate -- an act not constituting the business of insurance -- and proposing the use of non-OEM aftermarket parts and attempting to control the repair of the Dillons' vehicle, Farmers acted as a supplier in a consumer transaction subject to the Ohio Consumer Sales Practices Act. The fact that Farmers is an insurance company does not protect it from the application of the Act based on the express language of ORC § 1345.81.

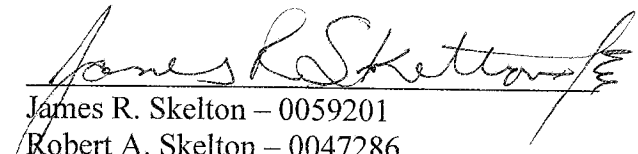
Third, the specific provisions of ORC 1345.81 making the statute and consumer protection remedies available against insurers issuing collision repair estimates takes precedence over the general provisions of ORC 1345.01. The legislature meant to regulate "insurers" when they issue written estimates proposing repairs with non-OEM parts. There is no other way to read the statutes and to resolve any conflict between them other than following Ohio law on statutory construction giving precedence to the specific statute enacted later in time than the general one.

Fourth, the Appellant cannot escape the requirements of Ohio Revised Code 1345.81 when unilaterally issuing an estimate without allowing the Appellee the choice to elect. To do so would contravene all elements of public policy and allow an insurer to avoid the requirements of

Ohio Revised Code 1345.81 by simply issuing an estimate before an insured has the ability to so elect.

Finally, the Appellant's act of issuing the written repair estimate without obtaining the signature of the Appellee is *per se* a violation of the Consumer Sales Practices Act and, therefore, an unfair or deceptive practice. Accordingly, Appellees Jerry and Nancy Dillon respectfully request that this Court affirm the decision of the Fifth District Court of Appeals.

Respectfully submitted,



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CERTIFICATE OF SERVICE

Counsel hereby certifies that a true and accurate copy of the foregoing was sent by regular U.S. Mail, postage pre-paid, on the 2nd day of September 2014, to:

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FARMERS INSURANCE OF COLUMBUS, INC.
Independence Ohio Field Claims Center
HelpPoint Claim Services By Farmers
FOR SUPPLEMENT CALL (800)282-7033

ESTIMATE OF RECORD

Written By: Mark Babb 10/21/2011 12:30 PM
Adjuster: Mark Babb (614)301-1478

Insured: NANCY DILLON
Owner: NANCY DILLON
Address: 51910 COUNTY RD 170
FRESNO, OH 43845
Other: (330)608-7881

Claim #1019911147-1-1
Policy #0192102120
Date of Loss: 10/15/2011 at 10:00 PM
Type of Loss: Comprehensive
Point of Impact: 12. Front

Inspect Location: MISSION AUTO CONNECTION
44672 US 36 W
COSHOCTON, OH 43812

REPAIR_SHOP

Repair Facility: MISSION AUTO CONNECTION
44672 US 36 W
COSHOCTON, OH 43812

Business: (740)623-8337
14 Days to Repair
License #

2009 MERC MILAN PREMIER 6-3.0L-FI 4D SED WHITE Int:GRAY
VIN: 3MEHM08149R628868 **Lic:** EQR 9060 OH **Prod Date:** **Odometer:** 40947

Air Conditioning	Rear Defogger	Tilt Wheel
Cruise Control	Telescopic Wheel	Intermittent Wipers
Climate Control	Keyless Entry	Alarm
Steering Wheel Controls	Message Center	Body Side Moldings
Dual Mirrors	Console/Storage	Overhead Console
Traction Control	Fog Lamps	Three Stage Paint
Power Steering	Power Brakes	Power Windows
Power Locks	Power Driver Seat	Power Mirrors
Heated Mirrors	Power Trunk/Gate Release	AM Radio
FM Radio	Stereo	Search/Seek
CD Changer/Stacker	Premium Radio	Auxiliary Audio Connectio
Satellite Radio	Anti-Lock Brakes (4)	Driver Air Bag
Passenger Air Bag	Head/Curtain Air Bags	Front Side Impact Air Bag
4 Wheel Disc Brakes	Leather Seats	Bucket Seats
Automatic Transmission	Overdrive	Aluminum/Alloy Wheels

NO.	OP.	DESCRIPTION	QTY	EXT. PRICE	LABOR	PAINT
1		FRONT BUMPER				
2		O/H front bumper			2.9	
3**	Repl	Qual Repl Parts CAPA Bumper cover	1	425.00	Incl.	2.6
4		Add for Three Stage				1.8
5		Add for fog lamps			0.4	
6	Repl	LT Cover w/fog lamps	1	38.58	Incl.	
7**	Repl	Qual Repl Parts Upper grille	1	39.00	Incl.	
8**	Repl	Qual Repl Parts Lower grille	1	48.00	Incl.	

Exhibit 1
Date 5-7-18 Pages

EXHIBIT A

ESTIMATE OF RECORD

2009 MERC MILAN PREMIER 6-3.0L-FI 4D SED WHITE Int:GRAY

NO.	OP.	DESCRIPTION	QTY	EXT. PRICE	LABOR	PAINT
9	Repl	Absorber	1	167.90	Incl.	
10	R&I	License bracket			0.2	
11	Repl	LT Side reinf	1	35.50	Incl.	
12		GRILLE				
13**	Repl	Qual Repl Parts Grille satin finish	1	234.00	0.3	
14	Repl	Emblem satin finish	1	27.77	Incl.	
15		FRONT LAMPS				
16*	Repl	LT Headlamp assy	1	326.16	Incl.	
17		Aim headlamps			0.5	
18**	Repl	Qual Repl Parts CAPA LT Fog lamp assy	1	75.00	Incl.	
19#	Repl	LT Side marker lamp	1	16.02	Incl.	
20		RADIATOR SUPPORT				
21**	Repl	Qual Repl Parts Lower deflector	1	51.00	Incl.	
22**	Repl	Qual Repl Parts CAPA Radiator support	1	115.00	s 6.5	
23		Evacuate & recharge			m 1.4 M	
24		Refrigerant recovery			m 0.4 M	
25	Repl	LT Air deflector	1	24.60	0.1	
26	Repl	Temp sensor	1	43.87	m 0.2	
27	Repl	Support panel	1	31.25	0.2	
28	Repl	LT Radiator seal	1	21.93	0.1	
29		COOLING				
30**	Repl	Qual Repl Parts Radiator	1	212.00	m Incl.	
31**	Repl	Qual Repl Parts Fan assy	1	205.00	m Incl.	
32	Repl	LT Radiator upper bracket	1	18.88		
33	Repl	Temp sensor	1	60.93	m 0.2	
34		AIR CONDITIONER & HEATER				
35**	Repl	Qual Repl Parts Condenser	1	196.00	m Incl.	
36		HOOD				
37**	Repl	Qual Repl Parts CAPA Hood	1	580.00	1.4	2.8
38		Overlap Major Non-Adj. Panel				-0.2
39		Add for Three Stage				1.0
40		Add for Underside(Complete)				1.4
41	Repl	RT Hinge	1	25.33	0.3	0.3
42		Add for Three Stage				0.1
43	Repl	LT Hinge	1	25.33	0.3	0.3
44		Add for Three Stage				0.1
45	Repl	Latch	1	37.47	Incl.	
46		FENDER				
47**	Repl	Qual Repl Parts CAPA RT Fender	1	154.00	2.0	2.0
48		Overlap Major Adj. Panel				-0.4
49		Add for Three Stage				0.6
50		Add for Edging				0.5
51		Deduct for Overlap			-0.4	
52**	Repl	Qual Repl Parts CAPA LT Fender	1	154.00	2.0	2.0

ESTIMATE OF RECORD

2009 MERC MILAN PREMIER 6-3.0L-FI 4D SED WHITE Int:GRAY

	NO.	OP.	DESCRIPTION	QTY	EXT. PRICE	LABOR	PAINT
	53		Overlap Major Adj. Panel				-0.4
	54		Add for Three Stage				0.6
	55		Add for Edging				0.5
	56		Deduct for Overlap			-0.4	
	57**	Repl	Qual Repl Parts LT Fender liner	1	39.00	Incl.	
	58**	Repl	Qual Repl Parts LT Splash shield	1	15.00	0.1	
	59	Repl	LT Fender front bracket	1	66.92	0.2	
	60	Repl	LT Shield	1	38.83	0.1	
	61*	Rpr	LT Apron/rail assy		s	2.0	1.0
	62*		Add for Three Stage				0.0
	63		ELECTRICAL				
	64*	Repl	Wire harness 3.0 Liter	1	479.85	4.0 M	
	65	Repl	Lower cover	1	26.73		
	66		ENGINE / TRANSAXLE				
	67	Repl	Air cleaner assy from 12/04/06	1	340.28 m	Incl.	
	68	Repl	Resonator	1	78.83 m	0.2	
	69	Repl	Air cleaner assy mount bracket	1	36.98		
	70		WINDSHIELD				
	71**	Subl	Qual Repl Parts Windshield plus kit	1	222.81 T		
	72*	Subl	Windshield Labor	1	169.00 T		
	73		COWL				
	74	Repl	LT Vent grille	1	24.03		
	75	Repl	Cowl vent panel	1	149.07	0.7	
	76		FRONT DOOR				
	77	Blnd	RT Outer panel w/o keyless lock pad				1.6
	78	Blnd	LT Outer panel w/keyless lock pad				1.6
	79	R&I	RT Belt w'strip			0.3	
	80	R&I	LT Belt w'strip			0.3	
	81*	R&I	RT Body side mldg			0.4	
	82*	R&I	LT Body side mldg			0.4	
	83	R&I	RT R&I mirror			0.3	
	84	R&I	LT R&I mirror			0.3	
	85	R&I	RT Run channel			0.3	
	86	R&I	LT Run channel			0.3	
	87	R&I	RT Applique			0.2	
	88	R&I	LT Applique			0.2	
	89	R&I	RT Handle, outside			0.4	
	90	R&I	LT Handle, outside			0.4	
	91	R&I	RT R&I trim panel			0.5	
	92	R&I	LT R&I trim panel			0.5	
	93*	R&I	LT Keyless lock pad white platinum			0.2	
N	94	R&I	RT Door glass MERCURY			0.6	

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ESTIMATE OF RECORD

2009 MERC MILAN PREMIER 6-3.0L-FI 4D SED WHITE Int:GRAY

NO.	OP.	DESCRIPTION	QTY	EXT. PRICE	LABOR	PAINT
95	R&I	LT Door glass MERCURY			0.6	
96#	Subl	4 Wheel Alignment	1	79.95 T		
97#		Clean and Retape Moldings	1		0.3	
98#		Cover Car	1	5.00	0.2	
99#		Flex Additive	1	3.00		
100#		Fluids - Antifreeze	1	15.00		
101#		Hazardous Waste	1	3.00		
102		OTHER CHARGES				
103#		Towing	1	200.00		
		Subtotals ==>		5382.80	32.6	19.8

Line 94 : For run channel access

Parts		4933.85
Body Labor	26.8 hrs @ $ 44.00/hr	1179.20
Paint Labor	19.8 hrs @ $ 44.00/hr	871.20
Mechanical Labor	5.8 hrs @ $ 65.00/hr	377.00
Paint Supplies		500.00
Sublet/Misc.		248.95
Other Charges		200.00
SUBTOTAL		$ 8310.20
Sales Tax	$ 8310.20 @ 7.0000%	581.71
TOTAL COST OF REPAIRS		$ 8891.91
ADJUSTMENTS:		
Deductible		240.00
TOTAL ADJUSTMENTS		$ 240.00
NET COST OF REPAIRS		$ 8651.91

ESTIMATE OF RECORD

2009 MERC MILAN PREMIER 6-3.0L-FI 4D SED WHITE Int:GRAY

QUALITY REPLACEMENT PARTS WARRANTY

OUR REPAIR ESTIMATE MAY SPECIFY THE USE OF QUALITY REPLACEMENT PARTS. QUALITY REPLACEMENT PARTS ARE PARTS NOT MANUFACTURED BY OR FOR THE ORIGINAL EQUIPMENT MANUFACTURER. WE WILL STAND BEHIND THE QUALITY REPLACEMENT PARTS THAT ARE SPECIFIED ON THIS ESTIMATE AND USED IN THE REPAIR OF YOUR VEHICLE, FOR AS LONG AS YOU OWN/LEASE THE VEHICLE. WE WARRANT THESE PARTS ARE OF LIKE KIND, QUALITY, SAFETY, FIT AND PERFORMANCE TO PARTS MANUFACTURED BY OR FOR THE ORIGINAL EQUIPMENT MANUFACTURER.

THIS WARRANTY EXCLUSIVELY COVERS LOSS OR DAMAGE THAT IS RELATED TO DEFECTS IN THE QUALITY REPLACEMENT PART. THIS WARRANTY DOES NOT COVER DAMAGE OR PART FAILURE DUE TO IMPROPER INSTALLATION, MISUSE, NEGLECT, ABUSE, IMPROPER MAINTENANCE, ABNORMAL OPERATION, OR NORMAL WEAR & TEAR.

SHOULD A SUPPLIER OF A PART SPECIFIED IN OUR REPAIR ESTIMATE, OR THE REPAIR FACILITY THAT PERFORMS THE REPAIR ON YOUR VEHICLE, BE UNABLE TO RESOLVE A LEGITIMATE COMPLAINT ABOUT THE QUALITY REPLACEMENT PART USED IN THE REPAIR, WE WILL MAKE EVERY EFFORT TO SEE THAT THE PROBLEM IS CORRECTED.

THIS WARRANTY AND ANY REPRESENTATIONS MADE HEREIN ARE NON-TRANSFERABLE AND EXTEND ONLY TO THE PARTY OWNING/LEASING THE VEHICLE AT THE TIME OF THE REPAIR.

FOR ASSISTANCE, PLEASE CONTACT THE NEAREST HELPPOINT CLAIM SERVICES OFFICE.

DISCLAIMER:

ANY PERSON WHO KNOWINGLY PRESENTS A FALSE OR FRAUDULENT INSURANCE CLAIM FOR THE PAYMENT OF A LOSS MAY BE GUILTY OF A CRIME AND MAY BE SUBJECT TO FINES AND CONFINEMENT IN STATE PRISON.

THE LABOR AND TAX RATES USED WERE DETERMINED BY THE VEHICLE INSPECTION LOCATION UNLESS THE REPAIR FACILITY WAS KNOWN AT THE TIME OF THE INSPECTION OR ANOTHER LOCATION WAS SPECIFIED BEFORE THE ESTIMATE WAS PREPARED

ESTIMATE OF RECORD

2009 MERC MILAN PREMIER 6-3.0L-F1 4D SED WHITE Int:GRAY

TO EXPEDITE THE HANDLING OF ANY SUPPLEMENTAL DAMAGES CLAIM, PLEASE HAVE THE APPROXIMATE AMOUNT OF ADDITIONAL DAMAGES AVAILABLE WHEN YOU CALL 1 (800) 282-7033. POTENTIALLY, A REINSPECTION MAY BE CONDUCTED WITHIN HOURS OF YOUR CALL. ALL SUPPLEMENTS MUST BE APPROVED BY A CLAIMS REPRESENTATIVE BEFORE REPAIRS ARE COMPLETED.

"If the above estimate includes a NAPA part price, the repair facility must complete a one time set up with their local NAPA retailer in order to receive the special "Farmers Preferred Parts Program" pricing. To accomplish set up, contact your local NAPA retailer and ask them to insert billing code number 9066 into your customer billing profile. The 9066 code will enable your repair facility to receive special pricing on all NAPA parts and/or supplies purchased. If you do not already have a local NAPA retailer account, please call 1-800 LET-NAPA for your nearest NAPA location."

ESTIMATE RECEIVED BY _____

Any person who, with intent to defraud or knowing that he is facilitating a fraud against an insurer, submits an application or files a claim containing a false or deceptive statement is guilty of insurance fraud.

Estimate calculated using a preset user threshold amount for the paint and material cost.

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.

Glass replacement is available by calling Safelite at 1-800-826-0914.

ESTIMATE OF RECORD

2009 MERC MILAN PREMIER 6-3.0L-FI 4D SED WHITE Int:GRAY

Estimate based on MOTOR CRASH ESTIMATING GUIDE. Unless otherwise noted all items are derived from the Guide DR2MX06, CCC Data Date 10/10/2011, and the parts selected are OEM-parts manufactured by the vehicles Original Equipment Manufacturer. OEM parts are available at OE/Vehicle dealerships. OPT OEM (Optional OEM) or ALT OEM (Alternative OEM) parts are OEM parts that may be provided by or through alternate sources other than the OEM vehicle dealerships. OPT OEM or ALT OEM parts may reflect some specific, special, or unique pricing or discount. OPT OEM or ALT OEM parts may include "Blemished" parts provided by OEM's through OEM vehicle dealerships. Asterisk (*) or Double Asterisk (**) indicates that the parts and/or labor information provided by MOTOR may have been modified or may have come from an alternate data source. Tilde sign (~) items indicate MOTOR Not-Included Labor operations. Non-Original Equipment Manufacturer aftermarket parts are described as AM, Qual Repl Parts or Comp Repl Parts which stands for Competitive Replacement Parts. Used parts are described as LKQ, Qual Recy Parts, RCY, or USED. Reconditioned parts are described as Recond. Recored parts are described as Recore. NAGS Part Numbers and Benchmark Prices are provided by National Auto Glass Specifications. Labor operation times listed on the line with the NAGS information are MOTOR suggested labor operation times. NAGS labor operation times are not included. Pound sign (#) items indicate manual entries. Some 2010 vehicles contain minor changes from the previous year. For those vehicles, prior to receiving updated data from the vehicle manufacturer, labor and parts data from the previous year may be used. The CCC ONE estimator has a complete list of applicable vehicles. Parts numbers and prices should be confirmed with the local dealership. THE FOLLOWING IS A LIST OF ABBREVIATIONS OR SYMBOLS THAT MAY BE USED TO DESCRIBE WORK TO BE DONE OR PARTS TO BE REPAIRED OR REPLACED: MOTOR ABBREVIATIONS/SYMBOLS: D=DISCONTINUED PART A=APPROXIMATE PRICE LABOR TYPES: B=BODY LABOR D=DIAGNOSTIC E=ELECTRICAL F=FRAME G=GLASS M=MECHANICAL P=PAINT LABOR S=STRUCTURAL T=TAXED MISCELLANEOUS X=NON TAXED MISCELLANEOUS PATHWAYS: ADJ=ADJACENT ALGN=ALIGN A/M=AFTERMARKET BLND=BLEND CAPA=CERTIFIED AUTOMOTIVE PARTS ASSOCIATION NSF=NSF INTERNATIONAL CERTIFIED PART D&R=DISCONNECT AND RECONNECT EST=ESTIMATE EXT. PRICE=UNIT PRICE MULTIPLIED BY THE QUANTITY INCL=INCLUDED MISC=MISCELLANEOUS NAGS=NATIONAL AUTO GLASS SPECIFICATIONS NON-ADJ=NON ADJACENT O/H=OVERHAUL OP=OPERATION NO=LINE NUMBER QTY=QUANTITY QUAL RECY=QUALITY RECYCLED PART QUAL REPL=QUALITY REPLACEMENT PART COMP REPL PARTS=COMPETITIVE REPLACEMENT PARTS RECOND=RECONDITION REFN=REFINISH REPL=REPLACE R&I=REMOVE AND INSTALL R&R=REMOVE AND REPLACE RPR=REPAIR RT=RIGHT SECT=SECTION SUBL=SUBLET LT=LEFT W/O=WITHOUT W/_=WITH/_SYMBOLS: #=MANUAL LINE ENTRY *=OTHER (IE..MOTORS DATABASE INFORMATION WAS CHANGED) **=DATABASE LINE WITH AFTERMARKET N=NOTES ATTACHED TO LINE. OPT OEM=ORIGINAL EQUIPMENT MANUFACTURER PARTS EITHER OPTIONALLY SOURCED OR OTHERWISE PROVIDED WITH SOME UNIQUE PRICING OR DISCOUNT. NWCPP=NATIONWIDE CRASH PARTS PROGRAM.

CCC Pathways - A product of CCC Information Services Inc.

ESTIMATE OF RECORD

2009 MERC MILAN PREMIER 6-3.0L-FI 4D SED WHITE Int:GRAY

ALTERNATE PARTS SUPPLIERS

3	Qual Repl Parts CAPA Bumper	Part No.	F01000606C	Price $425.00
18	Qual Repl Parts CAPA LT Fog	Part No.	F02590110C	Price $75.00
22	Qual Repl Parts CAPA Radiat	Part No.	F01225184C	Price $115.00
37	Qual Repl Parts CAPA Hood	Part No.	F01230259C	Price $580.00
47	Qual Repl Parts CAPA RT Fen	Part No.	F01241251PP	Price $154.00
52	Qual Repl Parts CAPA LT Fen	Part No.	F01240251PP	Price $154.00
57	Qual Repl Parts LT Fender 1	Part No.	F01250136	Price $39.00
58	Qual Repl Parts LT Splash s	Part No.	F01250147	Price $15.00

Keystone - FPPP - A
5830 GREEN POINTE DRIVE SOUTH
GROVEPORT, OH 43125
(800)820-3962
(614)272-8600

Keystone - FPPP - A
11950 MOSTELLAR ROAD
CINCINNATI, OH 45241
(800)848-6345
(513)961-5500

Keystone - FPPP - A
26691 ECKEL RD.
PERRYSBURG, OH 43552
(877)901-7278
(419)873-1044

Keystone - FPPP - A
1435 TRIPLETT BLVD.
AKRON, OH 44306
(800)822-5555
(216)398-7788

Keystone - FPPP - A
231 SILVER STREET
NEW ALBANY, IN 47150
(800)662-2955
(812)948-2329

Keystone - FPPP - A
85 CLEVELAND STREET
NASHVILLE, TN 37207
(800)966-3300
(615)226-9090

Keystone - FPPP - A
849 WHITAKER ROAD SUITE 190
PLAINFIELD, IN 46168
(800)525-4639
(317)895-0530

Keystone - FPPP - A
901 W. 12TH STREET
ERIE, PA 16501
(814)459-1300
(888)566-7844

Keystone - FPPP - A
3000 SISSONVILLE DRIVE
PARKERSBURG, WV 26010
(800)696-3064

ESTIMATE OF RECORD

2009 MERC MILAN PREMIER 6-3.0L-FI 4D SED WHITE Int:GRAY

ALTERNATE PARTS SUPPLIERS

35	Qual Repl Parts Condenser	Part No.	4227	Price $196.00
	Performance Radiator - FPPP 2447 6TH AVE. S. SEATTLE, WA 98134		(877)723-4286 (206)624-2440	
7	Qual Repl Parts Upper grill	Part No.	F01036120	Price $39.00
8	Qual Repl Parts Lower grill	Part No.	F01036134	Price $48.00
13	Qual Repl Parts Grille sati	Part No.	F01200484	Price $234.00
21	Qual Repl Parts Lower defle	Part No.	F01091100	Price $51.00
	Keystone - FPPP - UPS 3327 WEST 47TH PLACE CHICAGO, IL 60632		(800)622-0096 (773)927-9600	
30	Qual Repl Parts Radiator	Part No.	103195	Price $212.00
31	Qual Repl Parts Fan assy	Part No.	1730093	Price $205.00
	1-800-Radiator Central FPPP 19+ WHS, DELVR DAILY/OVERNIGHT CENTRAL, IL 60008		(800)723-4286	

ETC

IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

DEBRA WEBER, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. ET AL., Defendant.	CASE NO. CV 2005 1227 JUDGE RICHARD K. WARREN JUDGMENT ENTRY DENYING DEFENDANT'S CONVERTED MOTION FOR PARTIAL SUMMARY JUDGMENT

The matter of a Converted Motion for Partial Summary Judgment pursuant to Rule 12(B) and Rule 56 is presently before the Court. Defendant State Farm Automobile Insurance Co. ("State Farm") originally filed a Rule 12(B) Motion for Partial Dismissal that this Court converted to a summary judgment motion due to inappropriate pleadings. After reviewing applicable law, the parties' briefs, and all appropriate and relevant materials, the Court finds that the argument is not well taken and the motion is denied.

State Farm moved for dismissal of Plaintiff's Third Claim (violation of Ohio Consumer Sales Protection Act, "CSPA") of the Amended Complaint for several reasons including: 1) Plaintiff's CSPA claim was barred by the statute of limitations, 2) State Farm is not a "supplier" of the vehicle subject to liability

EXHIBIT B

under the CSPA, 3) There was not a "consumer transaction" between the Plaintiff and State Farm necessary for liability under the CSPA, and 4) the CSPA does not apply to traditional acts of an insurance company.

STANDARD FOR SUMMARY JUDGMENT

Because State Farm's motion was converted to a summary judgment motion, the standard for summary judgment must be addressed. Pursuant to Civil Rule 56 summary judgment is appropriate if: 1) there is no issue of material fact; 2) the moving party is entitled to judgment as a matter of law; and 3) reasonable minds can come to but one conclusion, and that conclusion is adverse to the party whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his or her favor. *State ex rel. Cassels v. Dayton City School Dist. Bd. Of Ed.* (1994), 69 Ohio St.3d 217, 219; See *Temple v. Wean United Inc.* (1977), 50 Ohio St.2d 317, 327. The burden of showing no genuine issue exists as to any material fact rests upon the moving party. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66.

The Ohio Supreme Court has established the standards for granting summary judgment under Civil Rule 56 when a moving party asserts that a nonmoving party has no evidence to establish an essential element of the nonmoving party's case. *Dresher v. Burt* (1996), 75 Ohio St.3d 280. Civil Rule 56(E) requires the nonmoving party to go beyond the pleadings, affidavits, or by the deposition, answers to interrogatories, and admissions on file, and designate

Atty. Tr.

specific facts showing there is a genuine issue for trial. *Id.* at 289 (citing *Celotex Corp. v. Catrett* (1986), 477 U.S. 317.

Further, the last two sentences of Civil Rule 56(E) provide that:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in the rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him. OHIO R. CIV. P. 56(E).

Accordingly, if the moving party has satisfied its initial burden, the nonmoving party must then set forth specific facts showing that there is a genuine issue for trial, and if the nonmovant does not respond, summary judgment, if appropriate, shall be entered against the nonmoving party. *Dresher*, 75 Ohio St.3d at 293.

Statute of Limitations

State Farm contends that pursuant to the language of Revised Code § 1345.10(C) that the Plaintiff's claim is barred by the statute of limitations. The Court disagrees. As this Court has held before, the Plaintiff's action is timely if it is within two years after the occurrence of the violation or one year after termination of the proceedings by the attorney general. (See *Collins v. State Farm Mutual Ins. Co.* CV 2006 0171, Allen County C.P. May 31, 2006. Plaintiff's action was time barred because it fell *after* one year from termination of proceedings by the attorney general.) The specific language of Revised Code § 1345.10(C) states, "An action under sections 1345.01 to 1345.13 of the Revised Code may not be brought more than two years after the occurrence of the violation

which is the subject of suit, or one year after the termination of proceedings by the attorney general with respect to the violation, *whichever is later*." OHIO REVISED CODE § 1345.01(C) Emphasis added.

The Plaintiff purchased the 1995 Buick in February of 2000 and received a letter outlining the condition of the vehicle's title at a later date. State Farm executed the AVC with the State of Ohio on January 5, 2005. Because the Plaintiff filed their claim on December 29, 2005 within one year of AVC agreement with the attorney general, it is unnecessary to address if the violation occurred more than two years prior to this action or whether discovery, equitable estoppel, or another related rule would apply as the later of the two dates must be used. Thus, the Plaintiff's action is timely filed.

The Scope of an Insurance Transaction & *Chesnut*

In *Chesnut v. Progressive Casualty Ins. Co.* the 8th District held that when an insurance company *obtained* a title for vehicle it declared a total loss it was done in its capacity as an insurance company and therefore part of an insurance transaction. *Chesnut v. Progressive Casualty Ins. Co.* 8th Dist. No. 84376, 2006 Ohio 2080. "Progressive *obtained* a title for a vehicle it declared a total loss before selling it at an auction. This was clearly done in Progressive's capacity as an insurance company and not subject to the CSPA." *Id* at ¶ 21 (emphasis added). This Court further distinguishes between when an insurance company obtains the vehicle after being declared a total loss and what it does subsequent to that.

Though the dissent of *Chesnut* more clearly articulates this position than the majority does, this Court's decision is still reconcilable with the majority opinion.

If the agreement between an insurance company and its insured is such that in the event of a total loss, it takes title and ownership of the vehicle, it is quite clear that this constitutes the "insurance transaction." However, once the vehicle is no longer the property of the insured, the insurance transaction terminates. The decision of what to do with the vehicle is now based on a business decision and no longer involves the insured or the policy between the insured and the insuring company.

If public safety were paramount, then clearly society could be best served by crushing or demolishing the vehicle so that there would be no chance of a potentially defective or dangerous vehicle entering the public realm. In contrast, consumers and some resources are best served by reselling the vehicle so that it may be repaired and placed back into the marketplace, salvaging the remaining usefulness of the vehicle. Also by doing this the insurance company has recouped some revenue from its loss paid out by the claim and thus reducing the overall costs of premiums for everyone else.

What is critical to note is that once the insurance company has gained the ownership of the vehicle, there is a decision to be made. The Defendant states their policy is generally not to retain vehicles obtained in this manner; however, they *could* if they so chose. Even if company policies dictate that the vehicles are not kept and are eventually resold, it would defy logic and reasoning to extend this

aspect of the decision as still part of the insurance transaction. The insurance company has now entered vehicle sales arena as an attempt to minimize loss paid on a policy --a clear and sound financial decision, but not a decision based on the agreement between State Farm and their insured.

Traditional Acts of Insurance Companies & "Supplier"

State Farm argues that they are acting in their capacity as an insurance company when they resell the vehicle. In one sense, yes, they are. It is in the same sense that any business acts in its corporate capacity when it sells off an asset. There is nothing unique or inherent to the insurance business that separates it from any other business when it sells the vehicles, even if this is traditionally done. An insurance company may not simply skirt around consumer protection laws by engaging in business outside of its regulated and excepted industry. When the legislature promulgated laws regulating the insurance industry it did so with the intention of regulating the business of insurance and insurance transactions--this entails agreements between the insurance company and its insured, not the insurance company's business practices aimed at increasing revenue.

Laws governing and regulating insurance companies are in place to act between the insurance companies and their insured. Consumer laws protect goods that have been bought for personal use when they are in the stream of commerce. State Farm chose to place this vehicle into the stream of commerce based on their company policy, not on any agreement with an insured party. A downstream consumer does not necessarily have agreement or policy with State Farm, nor is

there any requirement to be one for consumer protection laws to apply. State Farm's reliance on an agreement between the injured consumer and their initial actions is attenuated and baseless.

When examining the facts in a light most favorable to the Plaintiff, the Court finds that there still are questions of material facts remaining. For the above listed reasoning, the Defendant State Farm's Motion for Partial Dismissal (converted to a Motion for Partial Summary Judgment) is hereby denied.

IT IS SO ORDERED.

JUDGE RICHARD K. WARREN

RKW/gav
Dated: August 10, 2006
CC:

Ohio Senate
Statehouse
Columbus, Ohio 43266-0604
614/466-0626

Committees:
Highways & Transportation
Chairman
Health and Human Services
Education
State & Local Government

Scott Oelslager
State Senator
29th District

June 7, 1990

AGENDA

SENATE HIGHWAYS & TRANSPORTATION COMMITTEE MEETING
Tuesday, June 12, 1990
Immediately Following Session
Annex-3rd Floor Small Hearing Room

PENDING REFERRAL FROM THE SENATE REFERENCE AND OVERSIGHT COMMITTEE

		Sponsor/all interested parties
Sub. H.B. 302* (Verich)	Aftermarket crash parts-repair	1st hearing

This bill is a companion bill to S.B. 109 which was considered by the Senate Highways and Transportation Committee last year. H.B. 302 was approved by the House of Representatives 94-3.

* Possible Vote

xc: Sen. Gaeth, Sen. Gray, Sen. Montgomery, Sen. Snyder, Sen. Boggs, Sen. Butts, Sen. Fisher, Sen. Long

EXHIBIT C

EXHIBIT A

TO: Senate Republicans
FROM: Candee McIntosh, LSC Intern (4-8308)
RE: Senate Highways and Transportation Committee
DATE: April 11, 1989

AGENDA:
S.B. 71 (Pfeiffer) Free Replacement/Driver's License Crime Victim--1st Hearing
S.B. 109 (Horn) Use of Aftermarket Crash Parts--2nd Hearing
Am. H.B. 8 (Guthrie) Prohibit Minors-Motor Vehicle Open Cargo--1st Hearing
Am. H.B. 98 (Sweeney) Regional Transit Authority-Trustees--1st Hearing
H.B. 186 (Jones C.) Interstate 475-Rosa Parks Highway--2nd Hearing
H.B. 199 (Cera) Rt. 470/Bellmont Cty.-Vet. Mem. Highway--2nd Hearing

ROLL CALL:
Senators Gaeth, Gray, Montgomery, Snyder, Oelslager, and Long

I. S.B. 71 (Pfeiffer) Free Replacement Driver's License Crime Victim
   A. Sen. Pfeiffer, Sponsor
      1. provides victim of assault or attempted assault with free replacment of driver's license
      2. according to BMV 270,000 licenses are lost or stolen each year--bill applies only to those stolen as result of assault
      3. is not foreseen as a big expense because not many will be affected

II. Am. H.B. 8 (Guthrie) Prohibit Minors-Motor Vehicle Open Cargo
   A. Rep. Guthrie, Sponsor
      1. bill makes it illegal for minors age 16 or under to ride in the open bed of a vehicle at speed exceeding 25 mph
      2. passed House 85-14
      3. Questions
         a. Won't rural constituencies be disproportionately affected?
            1. We pass other legislation with economic impact. It is not good judgment to transport children in the back of a pick-up.
         b. What is the position of ODOT, BMV, and the Highway Patrol?

1. ODOT and ODHS are proponents.
c. Do farmers endorse it?
1. No opposition has surfaced from the Farm Bureau.

III. H.B. 186 (Jones C.) Interstate 475-Rosa Parks Highway
A. Professor Charles Ross, Ohio State University
1. golden opportunity to honor a great Afro-American
2. Ohio's children rarely see streets named after Afro-Americans
3. Columbus has named streets after persons still living (Jack Nicklaus)
4. the highway will remain I-475, but this portion would be designated the Rosa Parks Highway

IV. S.B. 109 (Horn) Use of Aftermarket Crash Parts
A. Sen. Horn, Sponsor
1. presented audio-visual demonstration furnished by Toyota
a. imitation crash parts are inferior to original automaker parts
b. original parts have earned place in the market--imitation parts have been given a place by insurance companies
B. Brooke Cheney, Automotive Service Asso.--Proponent
1. represents 500 Ohio independent auto repair shops
2. supports the opportunity to make customers more aware of the quality of auto body parts they are receiving
3. insurance estimates are often given for "quality replacement" or "non-OEM parts" and the customer does not realize the meaning of these terms
4. auto repair shops which will not use inferior parts often end up as negotiators between the consumer and the insurance company
5. issue should be similar to the use of "used parts"--everyone knows what they are and when they are used
6. this bill does not prohibit the use of non-OEM parts--it merely allows consumers to make an informed choice
7. few non-OEM parts have warranties--for those that do, it is often difficult to collect on them
8. this bill is a good consumer protection bill
9. Questions
a. Does the bill prohibit repair shops from charging less if an imitation part is used? (This was in reference to the converse of language in the bill stating repair shops are prohibited "from

charging more" if the customer demands an OEM part.)

1. This language ensures that if you are demanding your rights under insurance, you cannot be charged more.

b. Doesn't the bill lock insurance companies into using a manufacturer's part?

1. The intent is to be informative, not prohibitive.
2. Bill would help insurer and insured debate this themselves.
3. It is designed to protect the rights of the non-agressive person.

c. What type of part is the bill talking about?

1. Sheet metal parts, not internal parts.

d. What companies are being affected?

1. Some wholesale shops are affected, but most of the actual parts are imported.

10. Written Testimony Available

B. Paul T. Rabaut, Ford Parts and Service--Proponent

1. consumers are cheated when insurers tell them imitation parts must be installed
2. Ford is currently in litigation with a company for falsely claiming their part meets Ford's quality and specifications
3. use of imitation parts does not keep insurance rates down
   a. 1982-87, insurance rates went up 56%, while the cost of crash parts went down
   b. imitation parts take up to 150% more time to install
4. repair shops do have the same problem with internal parts because there are many good quality internal parts
5. non-OEM makers excluded automakers from the After-market Parts Association--the intent of this organization is to lend an image of quality to these parts by giving them a stamp of approval
6. 80% of consumers support legislation allowing informed decision-making

C. Jean Crocker, General Motors Service Parts--Proponent

1. bill protects the customers right to know
2. imitation manufacturers are only propped up by insurance companies
3. some insurance companies won't even used non-OEM parts on luxury or new cars
4. over 100 non-OEM companies do not offer warranties
5. OEM parts cost more due to quality, warranties and servicing--the price is usually less than 15% more than imitation parts

6. Questions
   a. Is this legislation identical to Oregon's?
      1. No, although it is similar in that Oregon requires informed consent if an imitation part is not certified. 16 states have enacted similar legislation.

D. Robert Kopp, Ohio State U.A.W. CAP Council--Proponent
   1. bill would assure that consumer is fully informed
   2. imitation parts often do not meet original equipment quality standards
   3. insurance rates are based upon the cost of OEM parts--thus, OEM parts should be used
   4. customers lose the portection of the manufacturer's warranty
   5. Written Testimony Available

V. Am. H.B. 98--no action on bill

VI. H.B. 199--no action on bill

VII. Adjournment