

[Cite as *Equicredit Corp. of Am. v. Jackson*, 2004-Ohio-6376.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

EQUICREDIT CORPORATION OF)	
AMERICA, d.b.a. EQUICREDIT,)	CASE NO. 03 MA 191
)	
PLAINTIFF-APPELLEE,)	
)	
- VS -)	OPINION
)	
WILLIAM JACKSON, et al.,)	
)	
DEFENDANTS/THIRD-PARTY)	
PLAINTIFFS-APPELLANTS.)	
)	
- VS -)	
)	
MOORE FINANCIAL ENTERPRISES,)	
INC., d.b.a. LENDERS DIV, et al.,)	
)	
THIRD-PARTY DEFENDANTS/)	
APPELLEES.)	

CHARACTER OF PROCEEDINGS:	Civil Appeal from Common Pleas Court, Case No. 01CV2900.
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JUDGMENT:	Affirmed in Part, Reversed in Part And Remanded.
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JUDGES:
Hon. Mary DeGenaro
Hon. Gene Donofrio
Hon. Joseph J. Vukovich

Dated: November 24, 2004

APPEARANCES:

For Plaintiff-Appellee:

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DeGenaro, J.

{¶1} This timely appeal comes for consideration upon the record in the trial court, the parties' briefs, and their oral argument to this court. Defendant/Third-Party Plaintiff-Appellant, Capitola Jackson, appeals the decision of the Mahoning County Court of Common Pleas that denied Jackson's motion for reconsideration and granted judgment to Third-Party Defendant/Appellee Moore Financial Enterprises, Inc. Jackson raises five issues on appeal in four assignments of error.

{¶2} First, Jackson contends that the trial court erred when granting summary judgment to Moore Financial regarding alleged violations of the Home Solicitation Sales Act. Moore Financial violates this act if it fails to put certain information into a contract arising from a home solicitation. Moore Financial has failed to demonstrate that it provided that information to Jackson in a contract and has failed to prove that any of the exemptions to that act apply in this case. Accordingly, Jackson's argument concerning the HSSA is correct.

{¶3} Second, Jackson argues that the trial court erred in granting summary judgment to Moore Financial regarding alleged violations of the Consumer Sales Practices Act. Any violation of the HSSA is a violation of the CSPA. Thus, the trial

court also erred when granting summary judgment to Moore Financial on this claim. But Jackson also claims other violations of that act and no reasonable fact-finder could conclude that Moore Financial acted unconscionably when it provided mortgage broker services to Jackson.

{¶4} Jackson's final three arguments concern the trial court's decision to grant summary judgment to Moore Financial regarding alleged violations of the Mortgage Broker Registration Act, fraud, and civil conspiracy. But no reasonable fact-finder could find Moore Financial liable under these claims since Jackson knew that it was a different company than another company involved in the transaction. Jackson and that other company gave Moore Financial all the false information involved in the transaction, and Moore Financial did not make any false statements to Jackson.

{¶5} For these reasons, the judgment of the trial court is affirmed in part, reversed in part, and this case is remanded for further proceedings on Jackson's claims of 1) violation of the HSSA and 2) violation of the CSPA but limited to the violation of the HSSA.

Facts

{¶6} Jackson and her husband own a home at 208 S. Garland Street in Youngstown, Ohio. The house had an appraised value of \$5,000.00 and was in a state of disrepair, so Jackson worried that the city would tear it down. Over the years, she refinanced her home a couple of times so necessary repairs, such as putting on a new roof, could be performed.

{¶7} In 2000, Jackson felt that the house needed new siding to prevent the city from tearing it down. At the time, she and her husband were both retired and lived on fixed incomes. Her husband had Alzheimer's disease, was on bottled oxygen, and only left the house to visit the doctor. She described herself as "slow" and needed help understanding financial documents.

{¶8} To obtain the siding, Jackson contacted Affordable Home Improvement Specialists, Inc. who agreed to put new siding on the house for \$18,879.00. At the time, Jackson had an outstanding mortgage with Equicredit Corporation of America.

Under the terms of that loan, Jackson owed Equicredit \$28,027.48 and her monthly payments were approximately \$270.00. Jackson knew she would have to refinance her home once more to purchase the siding and AHIS agreed to contact a mortgage broker to obtain a new home loan. Jackson knew that a mortgage broker would be contacted and expected that the broker would charge a fee for its services. Jackson told AHIS she could only afford to pay a total of \$320.00 per month under the terms of a new home loan.

{¶9} At AHIS's request, Moore Financial agreed to be the mortgage broker for Jackson. Because of Moore Financial's services, Equicredit eventually agreed to extend another home loan to Jackson. This was based on a loan application filled out by Jackson and AHIS, which incorrectly stated that the Jacksons' combined monthly income was \$1,309.38 and that their property was worth \$76,000.00.

{¶10} The new loan was for \$57,000.00. It paid off Jackson's prior loan with Equicredit as well as an outstanding judgment lien. Under the terms of that loan, Jackson was obligated to pay \$452.91 per month for the first twenty-four months, \$539.98 per month for the next three hundred thirty-five months, and \$544.20 as a final payment. In December 2000, Jackson signed the papers obliging her to pay the mortgage without reading them, so she was unaware that her monthly payments would exceed the monthly payment she told AHIS that she could afford.

{¶11} Soon after the closing, Jackson's husband died from a stroke and another son who had been living with her also died. Jackson informed AHIS that she was canceling the home improvement contract, but never informed either Moore Financial or Equicredit that she intended to cancel the new loan. She never made a payment on that loan.

{¶12} Eventually, Equicredit filed a complaint against Jackson and other defendants, seeking foreclosure. Jackson responded with an answer, two counterclaims, and a third-party complaint against Moore Financial and five other third-party defendants. That third-party complaint set forth the following seven causes of action: 1) violation of the Home Solicitation Sale Act; 2) violation of the Consumer

Sales Practices Act; 3) violation of the Ohio Credit Services Organization Act; 4) fraud; 5) violation of the Mortgage Broker Act; 6) civil conspiracy; and, 7) civil RICO.

{¶13} The trial court filed a scheduling entry that provided that the parties file all dispositive motions by April 18, 2003. That order did not give a timeframe for parties to file responsive briefs or for it to rule on those dispositive motions. The only party to move for summary judgment was Moore Financial who made that motion on April 18, 2003. The record does not contain an order giving a timeframe for Jackson to respond to the motion or for the trial court to rule on the motion. However, the parties refer to an April 22, 2003, order which stated that Jackson was to reply to Moore Financial's motion by May 19, 2003, and that the matter was set for a non-oral hearing on May 27, 2003.¹

{¶14} Jackson had not replied to Moore Financial's motion for summary judgment by May 27, 2003. That day the trial court signed an entry granting summary judgment to Moore Financial, but the judgment did not include Civ.R. 54(B) language and it was not filed until May 30, 2003. However, on May 28, 2003, after the trial court signed the entry granting summary judgment to Moore Financial but before that entry was filed, Jackson filed her memorandum in opposition to summary judgment and moved for the trial court to accept the filing instant. Jackson's excuse for filing the memorandum on May 28, 2003, rather than before was that her attorney had inadvertently calendared the date for submission as May 27, 2003, rather than May 19, 2003. The trial court did not rule on this motion prior to filing its already signed entry granting summary judgment to Moore Financial and did not specifically do so at any time thereafter.

{¶15} On June 6, 2003, Jackson filed a motion for reconsideration, asking that the trial court reconsider its decision granting summary judgment to Moore Financial for two reasons. First, that motion argued that the trial court should reconsider its judgment because counsel inadvertently filed Jackson's response on May 28th, rather

¹ It appears the "order" the parties refer to is a notice of assignment issued by the Mahoning County Assignment Commissioner. This, of course, is not a court order. It is also not in the record and we cannot consider it on appeal.

than on May 19th. Second, Jackson contended that the memorandum she filed in opposition to Moore Financial's motion for summary judgment demonstrated that there were genuine issues of material fact and that Moore Financial was not entitled to summary judgment as a matter of law. The trial court set the matter for an oral hearing.

{¶16} Moore Financial responded to Jackson's motion for reconsideration. It stated that Jackson did not file her memorandum in opposition to summary judgment until May 28th, the day after she admitted that she thought it was due. Thus, Moore Financial believed that the trial court should not grant the requested relief. In addition, Moore Financial argued that the trial court's decision granting summary judgment was a final order from which a motion for reconsideration is a nullity. Finally, Moore Financial argued that the trial court properly granted summary judgment to it, so the trial court should not reconsider its decision.

{¶17} Jackson replied to Moore Financial's response. In that reply, Jackson argued that the trial court's May 30th order was an interlocutory order, rather than a final one, and that the trial court can reconsider an interlocutory order. She relied on the fact that the trial court had not included Civ.R. 54(B) language in the May 30th order.

{¶18} Moore Financial responded once again. It clarified its belief that the lack of Civ.R. 54(B) language does not mean the order is interlocutory and its belief that the order granting it summary judgment was a final order. Accordingly, it believes that Jackson's motion to reconsider the May 30th decision is a nullity.

{¶19} After a hearing, the trial court entered judgment on the pending motion. In that entry, the trial court sustained its decision granting summary judgment to Moore Financial and included Civ.R. 54(B) language. It also denied Jackson's motion for reconsideration. It is from this judgment that Jackson timely appeals.

Preliminary Procedural Issues

{¶20} In their briefs, the parties dispute whether Jackson timely filed her memorandum in opposition to summary judgment. Moore Financial argues Jackson

did not file that memorandum in a timely manner, so she has waived her ability to raise the issues in her assignment of error on appeal. Jackson argues that the trial court's May 30th entry was merely an interlocutory order and that the trial court considered her memorandum when properly ruling on her motion for reconsideration. Accordingly, she believes she preserved her ability to raise the issues in her brief.

{¶21} Jackson argues that a decision granting summary judgment to a party is not final unless it finds "no just reason for delay" if claims against other parties are still pending. But "[t]he phrase 'no just reason for delay' is not a mystical incantation which transforms a nonfinal order into a final appealable order. * * * Such language can, however, through Civ.R. 54(B), transform a final order into a final appealable order." (Citations omitted) *Wisintainer v. Elcen Power Strut Co.*, 67 Ohio St.3d 352, 354, 1993-Ohio-0120. "An order which adjudicates one or more but fewer than all the claims or the rights and liabilities of fewer than all the parties must meet the requirements of R.C. 2505.02 and Civ.R. 54(B) in order to be final and appealable." *Noble v. Colwell* (1989), 44 Ohio St.3d 92, 96; *Chef Italiano Corp. v. Kent State University* (1989), 44 Ohio St.3d 86, syllabus. Accordingly, the lack of Civ.R. 54(B) language does not affect the finality of the trial court's decision; it only affects a party's ability to appeal that decision.

{¶22} Similarly, Moore Financial argues that Jackson's motion for reconsideration is a nullity since a party cannot ask a trial court to reconsider a final order. And this is true since "[t]he Ohio Rules of Civil Procedure do not prescribe motions for reconsideration after a final judgment in the trial court." *Pitts v. Ohio Dept. of Transp.* (1981), 67 Ohio St.2d 378, paragraph one of the syllabus. But a trial court has some discretion to treat a motion for reconsideration as a motion for relief from judgment under Civ.R. 60(B). *Stanley v. First City Co.*, 7th Dist. No. 00JE27, 2001-Ohio-3278; *McAuley v. Smith* (1999), 133 Ohio App.3d 685, 689-690. Thus, the fact that Jackson improperly titled her motion does not necessarily mean that the trial court may not rule on that motion.

{¶23} The point of contention between the parties is whether the trial court,

and therefore this court, may consider the memorandum Jackson filed in opposition to summary judgment. That memorandum was not filed by the date described in Mahoning County's local rules (fourteen days after the motion was filed) or by the date understood by the parties. It was not filed until after the trial court apparently signed its judgment entry. And since the trial court entered judgment without expressly determining Jackson's pending motion we must conclude that it implicitly denied that motion. See *Maust v. Palmer* (1994), 94 Ohio App.3d 764, 769. Thus, the real question before us is whether Jackson's motion to reconsider allows her to introduce the evidence attached to her memorandum in opposition to summary judgment.

{¶24} As stated above, a trial court may treat a motion for reconsideration as a motion for relief from judgment under Civ.R. 60(B). But to prevail on a Civ.R. 60(B) motion, the movant must demonstrate that he is entitled to relief pursuant to one of the enumerated grounds of Civ.R. 60(B), that he has a meritorious defense or claim to present if relief is granted, and that he brought his motion within the applicable time limit of Civ.R. 60(B). *GTE Automatic Elec., Inc. v. ARC Indus., Inc.* (1976), 47 Ohio St.2d 146, paragraph two of the syllabus. Although there is no question that the motion in this case was timely or that Jackson raises a meritorious defense to Moore Financial's motion for summary judgment, this does not mean that Jackson has demonstrated one of the enumerated grounds for relief.

{¶25} In this case, the trial court held a hearing on Jackson's motion, but Jackson has not provided this court with a transcript of that hearing. Thus, it is impossible to know what evidence Jackson presented to the court that could demonstrate one of the grounds for relief. Whenever an appellant bases her assignments of error on the evidence produced at a hearing, the appellant must provide us with a record to review. *State v. Budrovic* (Oct. 31, 2001), 7th Dist. No. 00 CA 5. App.R. 9 specifies how a party must file a transcript of the evidence or some acceptable alternative. Appellants have failed to file either a transcript or an App.R. 9 alternative.

{¶26} "The duty to provide a transcript for appellate review falls upon the

appellant. This is necessarily so because an appellant bears the burden of showing error by reference to matters in the record. * * * When portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower court's proceedings, and affirm." *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199.

{¶27} "This court has previously explained the consequences of failing to provide a transcript of the proceedings when assigning error to evidentiary rulings. In *J.F. Smith Plumbing & Heating v. McNamara* (Apr. 25, 1985), Mahoning App. No. 83CA17, unreported, we observed: 'There has been no transcript of proceedings filed by the appellant in this case. All of the allegations of the appellant under his assignments of error deal with statements of the trial judge and evidence presented and cannot be reviewed by this court because of the lack of a record. It is the duty and obligation of the appellant to properly perfect his appeal. Appellant having failed to do so, by necessity, we must affirm the judgment of the trial court.' Since appellant has failed to provide this court with a transcript or an acceptable alternative, there is nothing for us to pass upon and we must presume the validity of the trial court proceedings and affirm the judgment below." *DeCato v. Goughnour* (2000), 136 Ohio App.3d 795, 799.

{¶28} Because Jackson did not provide us with a transcript of the hearing on the motion for Civ.R. 60(B) relief, we must conclude that the trial court found that Jackson did not demonstrate that she was entitled to relief from judgment on any of the grounds enumerated in Civ.R. 60(B). Because the trial court never considered the evidence in Jackson's untimely memorandum in opposition to summary judgment, we must disregard that evidence as well.

{¶29} This does not necessarily mean that Jackson waived her ability to raise the issues in her brief on appeal. The mere fact that Jackson has not timely responded to Moore Financial's motion for summary judgment does not mean that Moore Financial is entitled to summary judgment. *Hooten v. Safe Auto Ins. Co.*, 100

Ohio St.3d 8, 2003-Ohio-4829, ¶43. "Civ.R. 56(E) provides that when a party fails to respond properly to a summary judgment motion, summary judgment, 'if appropriate, shall be entered against the party.'" Id. Thus, if the evidence Moore Financial put before the trial court in its motion for summary judgment was insufficient to sustain such a motion, then we must reverse the trial court's decision and remand this matter for further proceedings.

Standard of Review

{¶30} Each of Jackson's assignments of error deal with the trial court's decision to grant summary judgment to Moore Financial. When reviewing a trial court's decision to grant summary judgment, this court applies the same standard as the trial court and, therefore, engages in a de novo review. *Parenti v. Goodyear Tire & Rubber Co.* (1990), 66 Ohio App.3d 826, 829. Under Civ.R. 56, summary judgment is only proper when the movant demonstrates that, viewing the evidence most strongly in favor of the non-movant, reasonable minds must conclude no genuine issue as to any material fact remains to be litigated and the moving party is entitled to judgment as a matter of law. *Doe v. Shaffer*, 90 Ohio St.3d 388, 390, 2000-Ohio-0186.

{¶31} In a motion for summary judgment, "the moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." *Dresher v. Burt*, 75 Ohio St.3d 280, 296, 1996-Ohio-0107. The nonmoving party has the reciprocal burden of specificity and cannot rest on mere allegations or denials in the pleadings. Id. at 293.

Home Solicitation Sales Act

{¶32} In her first assignment of error, Jackson argues as follows:

{¶33} "The trial court erred in granting third-party defendant/appellee's motion for summary judgment when there were genuine issues of material fact in dispute that third-party defendant/appellee violated the Home Sale Solicitation Act and the Consumer Sales Practices Act."

{¶34} Jackson claims there were genuine issues of material fact regarding

whether Moore Financial gave Jackson notice of her right to rescind the agreement for mortgage broker services as required by the Home Solicitation Sales Act, R.C. 1345.21 et seq. In response, Moore Financial first stated that Jackson received and signed a notice of her right to cancel the transactions. It then contends that the HSSA does not govern its relationship with Jackson since Jackson initiated the contact between the parties.

{¶35} In order for the HSSA to cover a transaction, it must be a home solicitation sale as defined by that Act. *New Phila, Inc. v. Sagrilla*, 5th Dist. No. 2001 AP 04 0033, 2002-Ohio-3485, ¶28. R.C. 1345.21(A) defines a "home solicitation sale" as "a sale of consumer goods or services in which the seller or a person acting for the seller engages in a personal solicitation of the sale at a residence of the buyer, including solicitations in response to or following an invitation by the buyer, and the buyer's agreement or offer to purchase is there given to the seller or a person acting for the seller, or in which the buyer's agreement or offer to purchase is made at a place other than the seller's place of business."

{¶36} Moore Financial's agreement to provide mortgage broker services fits this general definition. The services which Moore Financial rendered to Jackson were "consumer goods or services" since they were "purchased * * * primarily for personal, family, or household purposes" and are not excluded by R.C. 1345.21(F). R.C. 1345.21(E). Moore Financial engaged in a personal solicitation of Jackson at her home after AHIS first contacted it through telephone contact with her. And Jackson agreed to purchase Moore Financial's services at her home.

{¶37} The HSSA exempts seven types of transactions from its coverage. The only one which could apply in this case is R.C. 1345.21(A)(4) which exempts any transaction in which "[t]he buyer initiates the contact between the parties for the purpose of negotiating a purchase and the seller has a business establishment at a fixed location in this state where the goods or services involved in the transaction are regularly offered or exhibited for sale."

{¶38} According to Moore Financial, the HSSA does not cover this transaction

because Moore Financial did not initiate the transaction. As evidence of this, Moore Financial cites Jackson's deposition wherein she states that AHIS put Jackson in contact with Moore Financial and that she only spoke with Moore Financial's representatives on the phone. But this is irrelevant if Moore Financial cannot prove the other elements of the exemption. See *New Phila* at ¶36 (The party seeking to assert the protection of an exemption bears the burden of proving the facts warranting the exemption.).

{¶39} In this case, there is no evidence regarding whether Moore Financial has a business establishment at a fixed location in this state where the services involved in the transaction are regularly offered or exhibited for sale. It is highly unlikely that Moore Financial does not have a business establishment that meets this definition. But it has not introduced any evidence of this at this point in the litigation. Without some evidence of this, Moore Financial cannot avail itself of the R.C. 1345.21(A)(4) exemption and it cannot be granted summary judgment on that basis.

{¶40} Moore Financial next argues that Jackson received and signed a notice of her right to cancel the transaction, but failed to exercise those rights. Under the HSSA, a "buyer has the right to cancel a home solicitation sale until midnight of the third business day after the day on which the buyer signs an agreement or offer to purchase." R.C. 1345.22. If the buyer chooses to cancel the sale, then the buyer must deliver written notice of cancellation to the seller at the address stated in the agreement or offer to purchase by mail, telegram, manual delivery, or other personal delivery. *Id.* However, a seller must notify the buyer of the right to cancel by complying with R.C. 1345.23(A) and (B). "Until the seller has complied with divisions (A) and (B) of this section the buyer may cancel the home solicitation sale by notifying the seller by mailing, delivering, or telegraphing written notice to the seller of his intention to cancel. The three day period prescribed by section 1345.22 of the Revised Code begins to run from the time the seller complies with divisions (A) and (B) of this section." R.C. 1345.23(C).

{¶41} R.C. 1345.23(A) requires that "[e]very home solicitation sale shall be

evidenced by a written agreement or offer to purchase in the same language as that principally used in the oral sales presentation and shall contain the name and address of the seller. The seller shall present the writing to the buyer and obtain the buyer's signature to it. The writing shall state the date on which the buyer actually signs." Furthermore, the contract must contain the following statement: "You, the buyer, may cancel this transaction at any time prior to midnight of the third business day after the date of this transaction. See the attached notice of cancellation for an explanation of this right." R.C. 1345.23(B)(1). Finally, the seller must attach a notice of cancellation that contains the language found in R.C. 1345.23(B)(2).

{¶42} Moore Financial has not provided any evidence of any contracts it entered into with Jackson evidencing compliance with R.C. 1345.23(A) and (B). Instead, it relies on documents AHIS supplied to Jackson. Jackson's contract with AHIS complied with R.C. 1345.23(A) and (B)(1) and Jackson signed a notice of cancellation from AHIS that complied with R.C. 1345.23(B)(2). But AHIS's contract with Jackson was to place siding on her house. Moore Financial's contract with Jackson was to provide her with mortgage broker services. Thus, AHIS's contract with Jackson does not cover Moore Financial's home solicitation sale of its services to Jackson.

{¶43} For these reasons, the trial court improperly granted summary judgment to Moore Financial on Jackson's claims arising from the HSSA. This portion of Jackson's first assignment of error has merit.

Consumer Sales Practices Act

{¶44} Jackson next argues that the trial court erred when it granted summary judgment to Moore Financial on her claims arising from the Consumer Sales Practices Act, R.C. 1345.01 et seq. Of course, any failure to comply with the HSSA "constitutes a deceptive act or practice in connection with a consumer transaction in violation of" the CSPA. R.C. 1345.28. But Jackson is also claiming violations of the CSPA independent of any violation of the HSSA. More specifically, Jackson argues that Moore Financial acted unconscionably when it entered into the mortgage broker

services contract with her.

{¶45} R.C. 1345.03(A) prohibits any "supplier" from "commit[ing] an unconscionable act or practice in connection with a consumer transaction. Such an unconscionable act or practice by a supplier violates this section whether it occurs before, during, or after the transaction." In the CSPA, a "supplier" is "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." R.C. 1345.01(C). A "consumer transaction" is "a sale, lease, assignment, award by chance, or other transfer of an item of goods, a service, a franchise, or an intangible, to an individual for purposes that are primarily personal, family, or household, or solicitation to supply any of these things." R.C. 1345.01(A).

{¶46} Moore Financial fits the definition of a supplier and its agreement to provide mortgage broker services constitutes a "consumer transaction" under the terms of the act. Thus, it may not commit an unconscionable act or practice in connection with the sale of those services.

{¶47} The CSPA does not define what constitutes an unconscionable act or practice. However, R.C. 1345.03(B) lists seven factors considered relevant to a determination of whether a given act or practice is unconscionable. *Sproles v. Simpson Fence Co.* (1994), 99 Ohio App.3d 72, 80. Jackson argues that the first four of those factors apply in this case to demonstrate that Moore Financial committed an unconscionable act or practice.

{¶48} "(B) In determining whether an act or practice is unconscionable, the following circumstances shall be taken into consideration:

{¶49} "(1) Whether the supplier has knowingly taken advantage of the inability of the consumer reasonably to protect his interests because of his physical or mental infirmities, ignorance, illiteracy, or inability to understand the language of an agreement;

{¶50} "(2) Whether the supplier knew at the time the consumer transaction was entered into that the price was substantially in excess of the price at which similar

property or services were readily obtainable in similar consumer transactions by like consumers;

{¶51} "(3) Whether the supplier knew at the time the consumer transaction was entered into of the inability of the consumer to receive a substantial benefit from the subject of the consumer transaction;

{¶52} "(4) Whether the supplier knew at the time the consumer transaction was entered into that there was no reasonable probability of payment of the obligation in full by the consumer." R.C. 1345.03(B).

{¶53} As each of these factors demonstrates, Jackson must be able to prove that Moore Financial knowingly took advantage of her. Courts require scienter to prove a violation of R.C. 1345.03. *Karst v. Goldberg* (1993), 88 Ohio App.3d 413, 417. "Knowledge," under R.C. 1345.01(E), "means actual awareness, but such actual awareness may be inferred where objective manifestations indicate that the individual involved acted with such awareness."

{¶54} Jackson argues that the trial court erred in granting summary judgment to Moore Financial because she and her husband were in failing health at the time of the transaction, she was slow and had difficulty understanding this type of transaction, she had difficulty reading large numbers, and she did not understand financial terms. She believes Moore Financial was overpaid for its services since she could have saved the broker's fee by applying for refinancing herself. And she contends that Moore Financial knew she did not have the financial means to fulfill the terms of her loan. Moore argues that it is entitled to summary judgment since there is no evidence that it was aware of these facts.

{¶55} Moore Financial's argument is correct, at least for some of these facts. Jackson testified that she had paid mortgage broker's fees when applying for past home loans and that it was normal to pay such a fee on a home loan. She did not have any evidence that the charged fee substantially exceeded the normally charged fee and was not aware of a cheaper mortgage broker fee anywhere. Given these facts, it does not appear that any reasonable fact-finder could conclude that Moore

Financial overcharged Jackson for the services it rendered to her.

{¶56} Likewise, there is no evidence that Moore Financial was aware that Jackson did not have the financial means to fulfill the terms of her loan. She testified that she and Weaver filled out the incorrect portions of her loan application and then forwarded that to Moore Financial and stated that Moore Financial's employees were not aware of the inaccuracies. No reasonable fact-finder could conclude that Moore Financial knew that Jackson did not have the financial means to fulfill the terms of her loan.

{¶57} The same does not necessarily hold true about Jackson's claim that Moore Financial knew that she and her husband were in failing health at the time of the transaction, she was slow and had difficulty understanding this type of transaction, she had difficulty reading large numbers, and she did not understand financial terms. Jackson's deposition reveals that she talked to Moore Financial's employees on the phone, but does not indicate those phone calls' contents. The mere existence of these phone calls do not demonstrate that Moore Financial was actually aware of Jackson's condition, but it may be possible that the content of those phone calls may have revealed these facts, or at least some of them, to Moore Financial. Moore Financial has failed to provide this court with any evidence regarding the content of those phone calls, either from Jackson or from its own employees. Because this court must construe all evidence in Jackson's favor for the purposes of summary judgment, it appears this court cannot say that Moore Financial was unaware of Jackson's physical and mental condition.

{¶58} Nevertheless, Jackson's difficulty in understanding the terms of this contract does not necessarily prove that she was unable to reasonably protect her interests. She herself admitted that she could have asked her daughter for help. She also admitted that she never even tried to read the terms of the contracts she was entering into. Her "inability [to] reasonably to protect [her] interests" was as much the result of her own actions as it was any mental condition she may have had preventing her from understanding the contracts she was entering into.

{¶59} The remaining question is whether any reasonable fact-finder could conclude that Moore Financial committed an unconscionable act or practice by agreeing to provide mortgage broker services to Jackson. It appears that on the facts of this case, a reasonable fact-finder could not make that finding. AHIS asked Moore Financial to perform mortgage broker services on Jackson's behalf. Moore Financial had no reason to doubt the financial information Jackson and AHIS provided to it. There is no indication that Jackson was unable to protect her interests. And Jackson admitted that she had no evidence that Moore Financial charged an excessive fee for the services it provided to her.

{¶60} As stated above, any violation of the HSSA is, by definition, a violation of the CSPA. R.C. 1345.28. Because Jackson's argument concerning the HSSA has merit, then her general argument about the CSPA also has merit. But Jackson's arguments about the CSPA independent of any violation of the HSSA are meritless. No reasonable fact-finder could conclude that Moore Financial engaged in an unconscionable act or practice when it agreed to provide mortgage broker services to Jackson.

Mortgage Broker's Act

{¶61} In her second assignment of error, Jackson argues as follows:

{¶62} "The trial court erred in granting third-party defendant/appellee's motion for summary judgment when there were genuine issues of material fact in dispute that third-party defendant/appellee violated the Mortgage Broker's Act."

{¶63} Jackson claims the trial court erred when it granted summary judgment to Moore Financial on her claims against it arising from the Mortgage Broker Registration Act, R.C. 1322.01 et seq. because Moore Financial showed a "conscious disregard" for Jackson's rights when it 1) "grossly exaggerated" Jackson's income; 2) failed to disclose that it would receive a broker's commission from the proceeds of the loan; 3) obtained a monthly loan payment it should have known that Jackson could not afford; and, 4) ignored her request to cancel the loan transaction.

{¶64} In response, Moore Financial echoes the arguments it made earlier. It

contends that Jackson and AHIS supplied all information contained in the loan application. It further contends that Jackson admitted that she was aware that Moore Financial would charge a fee for its services and that she approved of that fee.

{¶65} "The Ohio Mortgage Brokers Act (R.C. Chapter 1322) is designed in part to protect mortgage borrowers from wrongful conduct by mortgage brokers." *Myer v. Preferred Credit, Inc.*, 117 Ohio Misc.2d 8, 32, 2001-Ohio-4190. As Jackson argues and Moore Financial implicitly concedes, Moore Financial is a mortgage broker as defined by R.C. 1322.01(G) and Jackson is a buyer under 1322.01(A). R.C. 1322.07 prohibits any mortgage broker from engaging "in conduct that constitutes improper, fraudulent, or dishonest dealings" and "[k]nowingly mak[ing], propos[ing], or solicit[ing] fraudulent, false, or misleading statements on any mortgage document or on any document related to a mortgage." R.C. 1322.07(C), (E). A buyer injured by a violation of R.C. 1322.07 "may bring an action for recovery of damages." R.C. 1322.11(A)(1).

{¶66} Although Jackson accuses Moore Financial of wrongful conduct, the evidence demonstrates that no reasonable fact-finder could conclude that Moore Financial violated the MBRA. As discussed above, there is no evidence that Moore Financial was aware that the information on Jackson's loan application was incorrect. She testified that she and Weaver filled out the incorrect portions of her loan application and then forwarded that to Moore Financial and stated that Moore Financial's employees were not aware of the inaccuracies. Thus, Moore Financial was also unaware that it obtained a monthly payment that Jackson could not afford. In addition, Jackson admitted that she knew that Moore Financial would charge a broker's fee since she had paid mortgage broker's fees when applying for past home loans and believed that it was normal to pay such a fee on a home loan. Finally, Jackson admitted that Moore Financial never told her that there would be no increase in her payments and she never informed Moore Financial that she wanted to cancel the loan. Because no reasonable fact-finder could conclude that Moore Financial either engaged in improper, fraudulent, or dishonest dealings or knowingly made false statements on Jackson's loan application, her argument that the trial court erred by

granting summary judgment to Moore Financial on this claim is meritless.

Fraud

{¶67} In her third assignment of error, Jackson argues as follows:

{¶68} "The trial court erred in granting third-party defendant/appellee's motion for summary judgment when there were genuine issues as to material fact in dispute regarding whether third-party defendant/appellee engaged in fraud."

{¶69} According to Jackson, Moore Financial acted in concert with AHIS to assure her "that her obligation under the refinanced loan would be one that she could afford." Moore Financial argues that the evidence demonstrates that it did nothing wrong. According to Moore Financial, Jackson and AHIS provided all the false information in the loan application that could cause Jackson to have larger payments than she could afford. Once again, Moore Financial is correct.

{¶70} In order for a plaintiff to recover for fraud, she must prove, among other things, that the defendant knowingly or recklessly made a false statement with the intent of misleading another into relying upon it. *Burr v. Bd. of Cty. Commrs. of Stark Cty.* (1986), 23 Ohio St.3d 69, paragraph two of the syllabus. In this case, any reasonable fact-finder would conclude that Moore Financial's statements were not knowingly false. First, Jackson admitted in her deposition that Moore Financial never told her that her monthly payments would not increase by much if she obtained a new loan. Second, Moore Financial did not know that the information in Jackson's loan application was false. Jackson admitted that she and AHIS provided that information to Moore Financial. So it had no way of knowing that she would not be able to afford higher monthly payments. Third, Jackson admits that she knew that AHIS and Moore Financial are different companies. And she should know that one company's malfeasance (potentially AHIS's) does not mean that all other companies shared in that malfeasance.

{¶71} Essentially, Jackson's truncated argument in support of this assignment of error states that the trial court cannot grant summary judgment to Moore Financial on Jackson's fraud claim because there is no evidence that AHIS and Moore Financial

did not act in concert to perpetrate a fraud upon her. But she admits that the two are separate companies, that Moore Financial never made the false statement to her, and that she and AHIS gave Moore Financial false information to obtain the loan. Given these facts, Jackson's arguments in support of this assignment of error are also meritless.

Civil Conspiracy

{¶72} In her final assignment of error, Jackson argues as follows:

{¶73} "The trial court erred in granting third-party defendant/appellee's motion for summary judgment when there were genuine issues as to material fact in dispute regarding whether third-party defendant/appellee engaged in a civil conspiracy."

{¶74} A civil conspiracy is "a malicious combination of two or more persons to injure another in person or property, in a way not competent for one alone, resulting in actual damages." *LeFort v. Century 21-Maitland Realty Co.* (1987), 32 Ohio St.3d 121, 126. "An underlying unlawful act is required before a civil conspiracy claim can succeed." *Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464, 1998-Ohio-0294. The plaintiff must prove that the defendant acted with "that state of mind under which a person does a wrongful act purposely, without a reasonable or lawful excuse, to the injury of another." *Id.*, quoting *Pickle v. Swinehart* (1960), 170 Ohio St. 441, 443. "Civil conspiracy is considered an intentional tort." *USX Corp. v. Penn Cent. Corp.* (2000), 137 Ohio App.3d 19, 26.

{¶75} In this case, there is a complete lack of evidence establishing any kind of conspiracy. As addressed above, Jackson admitted that she knew the companies were separate companies. She does not give any indication that Moore Financial knew that AHIS had taken part in questionable transactions in the past. And she gives no evidence that Moore Financial knew about the false information in the loan application.

{¶76} Jackson attempts to compare this case to *Williams*. But in *Williams*, the defendant knew of its conspirator's financial problems, but still agreed to work with its conspirator to defraud third-parties. See *Id.* at 476. In this case, there is no evidence

that Moore Financial had any clue about the possible fraud being committed. Indeed, Jackson's testimony demonstrates the contrary. That makes this case like *Geo-Pro Serv., Inc. v. Solar Testing Laboratories, Inc.* (2001), 145 Ohio App.3d 514, 527, where the court of appeals affirmed a decision granting summary judgment to a defendant on a civil conspiracy claim since "there is no evidence of any malice or underlying unlawful act on the part of" that defendant.

{¶77} We are faced with a fact-pattern devoid of any evidence of conspiracy. Instead, the evidence before the trial court demonstrates that the companies are separate companies and that Jackson and AHIS gave false information to Moore Financial so it could secure a mortgage for her. No reasonable fact-finder could conclude that Moore Financial was part of a civil conspiracy. Jackson's fourth assignment of error is meritless.

Conclusion

{¶78} In conclusion, the trial court improperly granted summary judgment to Moore Financial on Jackson's claims arising from the HSSA and the CSPA. But the rest of Jackson's arguments are meritless. Her testimony demonstrates that she knew Moore Financial would charge a broker's fee, that she has no knowledge that the fee was excessive, that she and AHIS gave Moore Financial all the false information on the loan application, and that AHIS and Moore Financial are separate companies. For these claims, Jackson has failed to show that Moore Financial did anything other than she asked it to do, use the financial information she provided to it to secure a new mortgage for her. It did so.

{¶79} Accordingly, the judgment of the trial court is affirmed in part, reversed in part and this cause is remanded for further proceedings on Jackson's claims of 1) violation of the HSSA and 2) violation of the CSPA but limited to the violation of the HSSA.

Donofrio, J., concurs.

Vukovich, J., concurs.