[Cite as *Brogley v. Everybody Fitness, L.L.C,* 2015-Ohio-1395.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

JASON BROGLEY	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 26453
	:	
v.	:	T.C. NO. 14-CVF-451
	:	
EVERYBODY FITNESS, LLC	:	(Civil appeal from Montgomery County
	:	Municipal Court—Eastern Division)
Defendant-Appellant	:	
	:	

. . . . . .

O P I N I O N

Rendered on the ___10th___ day of ____April___, 2015.

. . . . . .

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DONOVAN, J.

{¶ 1} This matter is before the Court on the Notice of Appeal of EveryBody Fitness, LLC. ("EBF"). EBF appeals from the October 7, 2014 Amended Judgment Entry Granting Plaintiff's Motion for Summary Judgment, issued in Montgomery County Municipal Court, Eastern Division, in favor of Jason Brogley on his Consumer Sales Practices Act ("CSPA") Claims.

{¶ 2} Brogley filed a complaint against EBF and Wesley Harrell on May 22, 2014, alleging that on December 15, 2012, Brogley "entered into a 36 month contract for access to a fitness center located at 7355 Troy Pike, Huber Heights, Ohio 45424, that is owned and operated by Defendants (the Contract.)" Brogley asserted that the Contract required him "to pay a $100.00 enrollment fee before he could use the fitness center that was the subject of the contract," and that he was also required to pay $48.10 per month beginning on January 15, 2013, and an annual fee of $41.73 beginning on July 1, 2013. Brogley asserted that EBF "informed him that Zumba and other aerobic classes would be offered in 2013 as EBF expanded its business," but that "EBF failed to offer these classes and Mr. Brogley grew increasingly dissatisfied with his experience with EBF." Brogley asserted that he, through counsel, sent EBF a letter cancelling the Contract via certified mail to EBF's Huber Heights location on April 16, 2014. According to the complaint, in the letter, Brogley (1) "requested EBF refund all payments Mr. Brogley made under the Contract, less $10.00," (2) "requested the cancellation and return of any evidence of indebtedness executed by Mr. Brogley in connection with the Contract," (3) "requested notification of whether EBF intended to repossess or abandon any evidence of membership or other goods provided to Mr. Brogley by EBF," (4) "requested that EBF pay

Mr. Brogley $1,000.00 for Mr. Brogley's attorney's fees," and (5) "requested EBF pay Mr. Brogley $500.00 for Mr. Brogley's damages."

{¶ 3} The complaint alleges that on April 22, 2014, via a telephone call between Harrell and counsel for Brogley, "Harrell offered to cancel Mr. Brogley's membership in exchange for a waiver of Mr. Brogley's claims but refused to take any of the other actions requested in Mr. Brogley's April 16th letter." Brogley asserted that EBF and Harrell were subject to the CSPA and the Prepaid Entertainment Contract Act ("PECA"), and he alleged several violations thereof in Count One of the Complaint as follows:

• "The Contract required Mr. Brogley to pay more than $50.00 before he could use the facility that was the subject of the Contract in violation of R.C. 1345.42(B)(9)."

• "Paragraph 5(F) of the Contract purports to expand EBF's time to provide a refund upon notice of cancellation from 10 business days to 30 days, in violation of R.C. 1345.44(D)(1), (3)."

• "EBF failed to provide Mr. Brogley a paper copy of the Contract."

• "Because the Contract was a Prepaid Entertainment Contract, Mr. Brogley has and had a statutory right to cancel the Contract. R.C. 1345.43."

• "Mr. Brogley was entitled to cancel the Contract within 3 business days of the date Defendant provided a 'Notice of Cancellation' that complied with R.C. 1345.44(B). R.C. 1345.44(C)."

• "EBF failed to provide a proper 'Notice of Cancellation' that met the requirements of PECA at all times relevant to this transaction. R.C. 1345.43, R.C. 1345.44."

• "The Contract does not include a form captioned 'Notice of Cancellation' attached to it that is easily detachable. R.C. 1345.44(B)."

• “The Contract does not include two ‘Notices of Cancellation’ which are separate and apart from the terms of the Contract. R.C. 1345.44(B).”

• “The Contract does not have a ‘Notice of Cancellation’ printed in at least 10 point font. R.C. 1345.44(B).”

• “The Contract does not have a ‘Notice of Cancellation’ that provides an address to which Mr. Brogley could return the ‘Notice of Cancellation.’ R.C. 1345.44(B).”

• “The Contract was cancelled when EBF received the Cancellation Letter on April 22, 2014.”

• “Defendants failed to refund to Mr. Brogley all payments made under the Contract, less $10.00, within 10 business days of April 22, 2014, in violation of R.C. 1345.44(D)(4)(a).”

• “Defendants failed to cancel and return any note, negotiable instrument, or other evidence of indebtedness executed by Mr. Brogley in connection with the Contract and take any action necessary to reflect the termination of any security interest or lien created under the Contract, within 10 business days of April 22, 2014, in violation of R.C. 1345.44(D)(4)(b).”

• “Defendants failed to notify Mr. Brogley whether EBF intended to repossess or abandon any evidence of membership or other goods provided to Mr. Brogley by EBF pursuant to the Contract, within 10 business days of April 22, 2014, in violation of R.C. 1345.44(D)(4)(c).”

• “Defendants failed to honor the ‘Notice of Cancellation’ they received on April 22, 2014.”

• “Each and every one of Defendant’s failures to comply with PECA, R.C.

1345.41-50 is a deceptive act or practice under R.C. 1345.02. R.C. 1345.48(A)."

• "Defendants' actions described in the Factual Allegations and Count One of this Complaint were committed with **knowledge** within the meaning of R.C. 1345.01(E)."

• "Defendants' actions described in the Factual Allegations and Count One of this Complaint are each unfair, deceptive, and unconscionable consumer acts or practices in violation of the CSPA. R.C. 1345.02; R.C. 1345.03."

• "Violating the PECA has been determined by a court of this state to violate the CSPA, and that decision was made available for public inspection under R.C. 1345.05(A)(3) prior to this consumer transaction. *Smith v. Powerhouse Gym of Toledo*, PIF 10001890 (December 14, 1999)."

•"As of May 16, 2014, Mr. Brogley has paid in excess of $911.33 pursuant to the Contract. This figure includes $100.00 for the enrollment fee, $41.73 for an annual membership fee, and $769.60 for monthly membership fee since January 15, 2013."

• "Mr. Brogley incurred $6.49 in sending the April 16th Cancellation Letter."

• "Defendants are liable to Mr. Brogley in excess of three times his actual economic damages or $200.00, whichever is greater, R.C. 1345.09(B), up to $5,000.00 in non-economic damages, 1345.09(B), and attorney's fees and costs, pursuant to R.C. 1345.09(F), for each violation of the CSPA."

• "Defendants are liable to Mr. Brogley in excess of $1,802.66 (2 [x] (911.33-$10)) and his attorney's fees and costs for Defendants' failure to refund all of the payments Mr. Brogley made under the Contract with[in] 10 business days of April 22, 2014. R.C. 1345.48(B)."

{¶ 4} In Count Two of the complaint, Brogley sought an Order from the Court: 1)

requiring EBF to honor the Cancellation Letter; 2) requiring EBF to stop charging him under the Contract; 3) requiring EBF to comply with PECA; 4) requiring EBF to cancel and return any note, negotiable instrument, or other evidence of indebtedness executed by Brogely pursuant to the Contract and take action to reflect the termination of any security interest or lien created by the Contract; and 5) requiring EBF to notify Brogley whether it intends to repossess or abandon any evidence of membership or other goods provided to him under the Contract. Attached to the complaint, inter alia, is a copy of the Contract, and correspondence dated April 16, 2014 from counsel for Brogley to EBF cancelling the Contract.

{¶ 5} EBF and Harrell answered the complaint on June 19, 2014. Brogley filed his Motion for Summary Judgment against EBF on August 18, 2014, attached to which is, inter alia, his affidavit. In his motion Brogley asserted that he "was entitled to a Notice of Cancellation that complied with the requirements of R.C. 1345.44(B) because the Contract was a prepaid entertainment contract." Brogley asserted that EBF violated the CSPA "by including impermissible terms in the Contract." Brogely asserted as follows:

> Here, the Contract required Mr. Brogley to pay $100.00 before he could use EBF's Huber Heights facility. * * * This amount exceeded the $50.00 limit permitted by R.C. 1345.42(B)(9). The Contract also purported to expand EBF's time to provide a refund upon notice of cancellation from 10 business days to 30 days. * * * The Contract attempted to modify and partially waive Mr. Brogley's right to cancel the Contract. Mr. Brogely did not draft the Contract. * * * Mr. Brogley simply signed the Contract with language presented to him by EBF. * * * Thus, EBF's knowledge of the

> deceptive act or practice may be inferred from the facts that EBF presented the Contract to Mr. Brogley, and EBF was responsible for the language contained in the Contract. EBF's violation of the CSPA caused Mr. Brogley to suffer anxiety, stress, and mental anguish.

{¶ 6} Brogely further asserted that EBF "violated the CSPA by failing to honor Mr. Brogley's April 16, 2014 cancellation of the Contract." Brogley asserted that he "is entitled to $7,602.66, his reasonable attorney's fees, and a Court Order compelling EBF to honor Mr. Brogley's Notice of Cancellation."

{¶ 7} Brogley's affidavit provides in part that EBF did not provide him with a printed copy of the Contract and a duplicate copy of the Notice of Cancellation. He averred that EBF did not provide a copy of the Notice of Cancellation that was easily detachable from the Contract, and that the Notice of Cancellation was "in smaller than 10 point type." Brogley averred that the Notice of Cancellation failed to include "the actual address of the location where I could return the Notice of Cancellation." Brogley asserted that he was required to pay an annual fee and a monthly fee before he could use the facility. Brogley averred that as of the date of the affidavit, EBF has failed to send him written documentation of the cancellation of the Contract, a refund for the payments he made pursuant to the Contract, and written notice "whether it intends to abandon or repossess any evidence" of his membership. Brogley averred that EBF "has not offered to pay me any money to compensate for the expenses I have incurred in enforcing my rights." According to Brogley, he paid EBF $911.33 to date and incurred $6.49 in sending his Notice of Cancellation. Finally, Brogley averred that as "a result of EBF's attempts to impose statutorily barred terms in the Contract, and EBF's failure to honor my

Notice of Cancellation, I have suffered sleepless nights, stress, anxiety, and mental anguish."

{¶ 8} Also attached to the Motion for Summary Judgment is the affidavit of counsel for Brogley, which provides that "On or around July 28, 2014, I requested the Ohio Secretary of State to send me written confirmation that *Smith v. Powerhouse Gym of Toledo*, PIF No. 10001890 was available for public inspection. (*Smith* attached as Exhibit 1)." The affidavit provides that "On or around July 29, 2014, the Ohio Secretary of State's (sic) sent me written confirmation that *Smith* was available for public inspection since June 16, 2000." The affidavit provides that "Exhibit 2 is a true and accurate copy of the documents I received from the Ohio Secretary of State's Office on or around August 1, 2014." Attached to the affidavit is a copy of the complaint in the *Smith* matter alleging violations of the CSPA and the PECA. Also attached is the decision in the *Smith* matter, from the Municipal Court of Toledo, Lucas County, granting a default judgment in the amount of $1,410.00 in favor of Smith and noting that the "defendant has been duly served according to law but has failed to answer in a timely fashion or otherwise defend this action as required by the Rules of Civil Procedure." Also attached to the affidavit is a Certificate of Availability for Public Inspection regarding the *Smith* matter from the Office of the Ohio Attorney General.

{¶ 9} EBF responded to the motion for summary judgment on August 28, 2014, and attached to its response is, inter alia, Harrell's affidavit. Harrell's affidavit provides that he is the owner of EBF, which operates three fitness clubs in Huber Heights, Kettering, and Centerville. Harrell averred that he has "personally overseen the operations of these three clubs since becoming the owner on April 3, 2012. Before I

became the owner of these three fitness clubs, all three facilities were in existence, under prior ownership, since 2007. All three clubs have been in existence and not under construction since 2007." Harrell further averred that Brogley and his wife, Tanja Brogley, became members of EBF on December 15, 2012, when Jason Brogley signed a contract for a 36 month family membership. Harrell attached the attendance records for the Brogleys, and he asserted that Brogley "publicly supported and endorsed [EBF] using Facebook and Google Reviews" in the course of his membership. Harrell stated that he learned that Brogley wanted to cancel his membership in late March or early April, and that on May 8, 2014, Harrell "personally gave the directive to my staff to cancel Mr. Brogley's membership, as I understood that to be what the Brogley's (sic) wanted. Despite his contractual obligations, [EBF] last charged Mr. Brogley on April 18, 2014." Paragraph 14 of the Affidavit provides: "The font size on the Notice of Cancellation section of the Membership Agreement is exactly ten point size type. I have obtained confirmation in writing from ABC Financial, which handles [EBF's] billing and produced the Membership Agreement, that Notice of Cancellation on our Membership Agreement is exactly ten point size type, fully in compliance with Ohio law."

{¶ 10} Also attached to EBF's memorandum in opposition is the Affidavit of Kayley Roberts, the General Manager at EBF. She averred that she "personally assisted [Brogley] when he enrolled in a 36 Month Family Membership for him and his wife, Tanja." The affidavit further provides as follows:

> 4. I engaged in the same procedure for a new member with Mr. Brogley that I do for all new members of [EBF]. That procedure is as follows: I personally use a detailed presentation book which shows all the

terms of the agreement. After deciding to join, I showed the customer a computer version of the contract with the hard copy still out and available for their review. The customer, in this case Mr. Brogley, initials the contract in two places and signs in two places. When the contract was complete, Mr. Brogely was automatically emailed a copy of the agreement. I have personal knowledge that the email to Mr. Brogley with a copy of his agreement transmitted successfully. A copy of this successful email transmission is attached as **Exhibit 1**.

5. Finally, Mr. Brogley, like all new members, was given a printed copy of the agreement at the time he became a member.

{¶ 11} On September 8, 2014, Brogley filed a motion to strike paragraph 14 of Harrell's affidavit on the basis of hearsay. On September 12, 2014, Brogley filed a "Motion of Plaintiff Jason Brogley for Leave to File Reply Instanter," and a Reply to EBF's memorandum in opposition to the motion for summary judgment. On September 12, 2014, the trial court sustained Plaintiff's motion to strike paragraph 14 of Harrell's affidavit.

{¶ 12} In ruling on Brogley's motion for summary judgment, the trial court determined as follows:

The Court finds Defendant EBF knowingly violated Ohio's Consumer Sales Practices Act ("CSPA") by (1) requiring Plaintiff to pay more than $50.00 before he could use Defendant EBF's Huber Heights facility, R.C. 1345.42(B)(9); (2) purporting to expand the time in which it could refund Plaintiff's money after receiving a Notice of Cancellation, R.C. 1345.44(D)(1); (3) failing to send Plaintiff written evidence of the

cancellation of the Contract within 10 business days of its receipt of his Notice of Cancellation, R.C. 1345.44(D)(4)(b); (4) failing to notify Plaintiff whether Defendant EBF intended to repossess or abandon any evidence of membership, R.C. 1345.44(D)(4)(c); and (5) failing to refund all of the money Plaintiff paid Defendant EBF, less $10.00, R.C. 1345.44(D)(4)(a).

Accordingly, pursuant to Count One of Plaintiff's Complaint, the Court awards Plaintiff $7,602.66 and his reasonable attorney's fees and costs incurred in prosecuting this matter for Defendant EBF's violations of the CSPA. This amount reflects $1,802.66 for Defendant EBF's failure to refund Plaintiff's payments, R.C. 1345.48(B), $800.00 in statutory damages for Defendant EBF's four other CSPA violations described above, R.C. 1345.09(B), and $5,000.00 in actual non-economic damages, R.C. 1345.09(B). The Court shall hold a damages hearing on _____ at _____A.M./P.M. to determine the amount of Plaintiff's reasonable attorney's fees and costs, R.C. 1345.48(B); R.C. 1345.09(F)(2).

Pursuant to Count Two of Plaintiff's Complaint, the Court orders Defendant EBF to cancel the gym membership contract at issue in this matter, R.C. 1345.09(D). Within 14 days of the filing of this Judgment Entry, Defendant EBF shall send Plaintiff, through counsel, written confirmation of the cancellation of the contract, and written notification of whether Defendant EBF intends to repossess or abandon any evidence of membership provided to Plaintiff pursuant to the contract.

{¶ 13} The court by separate entry set the matter for a hearing on October 6, 2014

on the issue of attorney fees. On October 1, 2014, EBF filed "Defendant's Motion to Stay or, in the Alternative, Motion for Entry of Final Judgment (Civ.R. 54(B))," asserting that the claims against Harrell are still pending, and that "a hearing on attorneys' fees incurred through October 6, 2014 will only needlessly increase litigation fees and expert witness fees and will not result in reaching a final resolution on that issue." EBF further asserted, in "the alternative, if this Court is not inclined to grant Defendant's requested stay, Defendants move this Court for the issuance of an Order which amends the September 12, 2014 *Judgment Entry* to include 'an express determination that there is no just reason for delay,' as required by Civ.R. 54(B) and thus providing Defendants with an immediate right to appeal the *Judgment Entry* at issue, in advance of the 14 day deadline expressed in the *Judgment* Entry and also in advance of the October 6, 2014 hearing on attorney's fees." On October 1, 2014, the court granted the motion, which Brogley opposed on October 3, 2014.

{¶ 14} The court's "Amended Judgment Entry Granting Plaintiff's Motion for Summary Judgment" provides: "The Court's Judgment Entry of September 12, 2014 shall be amended to state as follows: 'Pursuant to Civ.R. 54(B), the Court enters final judgment upon the claims stated herein and expressly determines that there is no just reason for delay.'"

{¶ 15} EBF asserts three assignments of error herein. EBF's first assigned error is as follows:

> THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON THE GROUNDS THAT EVERYBODY FITNESS VIOLATED THE CSPA BY CHARGING A FEE IN EXCESS OF THAT

OUTLINED IN R.C. 1345.42(B)(9).

A. EveryBody Fitness was not Unavailable for Use at the Time the Fee was Paid.

B. The $100.00 Fee Applied to Two Memberships – Jason Brogley and Tanja Brogley.

{¶ 16} As this Court has previously noted:

When reviewing a summary judgment, an appellate court conducts a de novo review. *Village of Grafton v. Ohio Edison Co*., 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). “De Novo review means that this court uses the same standard that the trial court should have used, and we examine the evidence to determine whether as a matter of law no genuine issues exist for trial.” *Harris v. Dayton Power & Light Co*., 2d Dist. Montgomery No. 25636, 2013–Ohio–5234, ¶ 11 (quoting *Brewer v. Cleveland City Schools Bd. [o]f Edn*., 122 Ohio App.3d 378, 383, 701 N.E.2d 1023 (8th Dist.1997) (citing *Dupler v. Mansfield Journal Co* ., 64 Ohio St.2d 116, 413 N.E.2d 1187 (1980)). Therefore, the trial court's decision is not granted any deference by the reviewing appellate court. *Brown v. Scioto Cty. Bd. Of Commrs*., 87 Ohio App.3d 704, 711, 622 N.E.2d 1153 (4th Dist.1993).

Civ. R. 56 defines the standard to be applied when determining whether a summary judgment should be granted. *Todd Dev. Co., Inc. v. Morgan*, 116 Ohio St.3d 461, 463, 880 N.E.2d 88 (2008). Summary judgment is proper when the trial court finds: “(1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment

> as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the Motion for Summary Judgment is made, who is entitled to have the evidence construed most strongly in his favor." *Fortune v. Fortune*, 2d Dist. Greene No. 90–CA–96, 1991 WL 70721, *1 (May 3, 1991) (quoting *Harless v. Willis Day Warehouse Co.*, 54 Ohio St.2d 64, 67, 375 N.E.2d 45 (1978)). The initial burden is on the moving party to show that there is no genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 292–93, 662 N.E.2d 264 (1996). Once a moving party satisfies its burden, the nonmoving party may not rest upon the mere allegations or denials of the party's pleadings. *Dotson v. Freight Rite, Inc*., 2d Dist. Montgomery No. 25495, 2013–Ohio–3272, ¶ 41 (citation omitted).

Cincinnati Ins. Co. v. Greenmont Mut. Hous. Corp., 2d Dist. Montgomery No. 25830, 2014-Ohio-1973, ¶ 17-18.

{¶ 17} We initially note that the CSPA and the PECA govern the business practices of EBF. The CSPA is set forth in R.C. 1345.01 et seq., and it prohibits unfair, deceptive, and unconscionable acts or practices in connection with consumer transactions. R.C. 1345.02 and 1345.03. " 'Consumer transaction' means a sale, lease, assignment, award by chance, or other transfer of an item of goods, a service, a franchise, or an intangible, to an individual for purposes that are primarily personal, family, or household, or solicitation to supply any of these things." R.C. 1345.01(A). " 'Supplier' means a seller, lessor, assignor, franchisor, or other person engaged in the business of effecting or soliciting consumer transactions, whether or not the person deals

directly with the consumer." R.C. 1345.01(C). " 'Consumer' means a person who engages in a consumer transaction with a supplier." R.C. 1345.01(D).

{¶ 18} As noted by the Supreme Court of Ohio:

> The CSPA "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." * * * One of its purposes is to make "private enforcement of the CSPA attractive to consumers who otherwise might not be able to afford or justify the cost of prosecuting an alleged CSPA violation, which, in turn, works to discourage CSPA violations in the first place via the threat of liability for damages and attorney fees." * * * .

Whitaker v. M.T. Automotive, Inc., 111 Ohio St.3d 177, 2006-Ohio-5481, 855 N.E.2d 825, ¶11.

{¶ 19} The PECA is set forth in R.C. 1345.41 et seq. R.C. 1345.48(A) provides that "Failure to comply with sections 1345.41 to 1345.50 of the Revised Code constitutes a deceptive act or practice in connection with a consumer transaction in violation of section 1345.02 of the Revised Code." R.C. 1345.41 provides as follows:

> (A) "Prepaid entertainment contract" means a contract under which the buyer of a service pays for or becomes obligated to pay for service prior to the buyer's receipt of or enjoyment of all of the service and that is a contract for:
>
> * * *
>
> (4) Health spa service, which includes contracts for instruction, training, or assistance in physical culture, body-building, exercising,

> reducing, figure development, or any other similar activity or for the use of the facilities of a health spa, gymnasium, or other facility used for any purpose described in this division, or for membership in any group, club, association, or organization formed for any purpose described in this division.

{¶ 20} R.C. 1345.42 governs the requirements of prepaid entertainment contracts and provides in part: "(B) Prepaid entertainment contracts shall: * * * (9) Not require the buyer to pay more than fifty dollars or ten percent of the total contract price, whichever is the lesser amount, *prior to the date on which the facility or service that is the subject of the contract is available for use by the buyer*." (Emphasis added).

{¶ 21} We conclude that by its plain language, R.C. 1345.42(B)(9) prohibits suppliers from charging consumers a pre-payment in excess of $50.00 or ten percent of the contract price when the facility is not available for use at the time the contract is signed. *See State ex rel. Celebrezze v. Scandinavian Health Spa, Inc.*, Summit C.P. No. CV863-1158, 1986 WL 363150 (March 31, 1986). Brogley did not aver that the EBF facility was not available for use at the time he signed the Contract, only that he was required to pay certain fees "before I could use the facility." Harrell asserted that the EBF facilities "have been in existence and not under construction since 2007," and that he has owned them since April 3, 2012. The Contract provides: "My membership permits me to use the premises, facilities, equipment and services at the Club location stated on the front side of this Contract * * *." The Contract lists the address of 7355 Old Troy Pike, Dayton, OH 45424. Construing the evidence most strongly in favor of EBF, we conclude that, since Brogley had access to EBF at the time the Contract was signed, EBF did not

violate R.C. 1345.42(B)(9). In the absence of a genuine issue of material fact, EBF's first assigned error is sustained.

{¶ 22} EBF's second assigned error is as follows:

> THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON THE GROUNDS THAT EVERYBODY FITNESS EXTENDED THE TIME FOR A REFUND, FAILED TO PROVIDE A FULL REFUND WITHIN TEN DAYS, AND FAILED TO NOTIFY BROGLEY OF ITS INTENTIONS WITH REGARD TO EVIDENCE OF MEMBERSHIP.

{¶ 23} EBF asserts that the Contract "complied with the requirements of R.C. 1345.44(A)-(B) in style, form, and wording, and despite granting Summary Judgment for the Plaintiff, the court failed to find a specific defect in the Notice of Cancellation or the Membership Agreement as a whole." EBF relies upon Roberts' affidavit and asserts that Brogley received an email copy of the Contract, "thus providing the form in duplicate as required." EBF asserts that the "Notice of Cancellation is found at the bottom of a page of the Membership Agreement and can be torn, cut, or severed using any readily available means." EBF asserts that Brogley's cancellation was late and upon "receipt of a late notice of cancellation the seller has no duty to provide a refund within ten days, no obligation to notify the buyer of its intention regarding goods or evidence of membership, and no duty to complete any of the other steps outlined in R.C. 1345.44(D)(4)." EBF asserts that the trial court failed to "identify what specific language of the Agreement violated [R.C.] 1345.44(D)(1). Presumably the Municipal Court found that Section 5(F) of the Additional Terms and Conditions section of the Membership Agreement violated R.C. 1345.44(D)(1)." EBF asserts that "a plain reading of Section 5 of the Terms and

Conditions clearly indicates that this Section deals with cancellations pursuant to the following: (1) death or disability, (2) the buyer relocating 25 miles or more from the facility, or (3) the seller relocating the facility 25 miles or more from the buyer's [residence]." According to EBF, there "is no indication in the Agreement or in Section 5 that if a buyer were to exercise the three day right to cancel, that such buyer would not receive its refund within the strict confines of the CSPA." EBF additionally asserts that R.C. 1345.44(D)(4)(b) "does not require written evidence of cancellation to be sent within 10 days of receipt of a notice of cancellation." Finally, EBF asserts that the "record does not contain any evidence of membership, thus no violation of R.C. 1345.44(D)(4)(c) could occur and R.C. 1345.46 already provides a remedy."

{¶ 24} R.C. 1345.44 provides: "(A) Every prepaid entertainment contract shall state the date on which the buyer actually signs. The seller shall give the buyer a copy of the contract that has been signed by the seller and complies with division (B) of this section." Division (B)(1) provides:

> A completed form, in duplicate, captioned "notice of cancellation," shall be attached to the contract signed by the buyer and be easily detachable and shall contain in ten-point bold-face type, the following statement:
>
> "NOTICE OF CANCELLATION"
>
> (Enter date of contract)
>
> (Date)
>
> You may cancel this contract for any reason any time prior to midnight of the third business day after the date on which the first service is available * * *.

If you cancel within this period, the seller must send you a full refund of any money you have paid, except that a reasonable fee not to exceed ten dollars may be charged if you have received your first service under the contract. The seller must also cancel and return to you within twenty business days any papers that you have signed.

To cancel this contract you must deliver in person, manually, or by certified mail, return receipt requested, the signed and dated copy of this cancellation notice or any other written notice of cancellation, or send a telegram, to (name of seller), at (the address of any facility available for use by you) not later than midnight of the third business day after the date on which the first service under the contract is available* * *.

I hereby cancel this contract.

(Date)

(Buyer's signature)…….....

{¶ 25} The remainder of R.C. 1345.44 provides in relevant part as follows:

* * *

(2) Before furnishing copies of the notice of cancellation to the buyer, the seller shall complete both copies by entering the name of the seller, the address of the seller's place of business, and the date of the contract.

(C) Until the seller has complied with this section, the buyer may cancel the contract by delivering to the seller by certified mail, personal or manual delivery, or telegraphing written notice of his intention to cancel.

The period within which the buyer may cancel the contract prescribed by this section begins to run from the time of the seller (sic) complies with divisions (A) and (B) of this section.

(D) In any prepaid entertainment contract no seller shall:

(1) Include in any contract, any confession of judgment or any waiver of any rights to which the buyer is entitled under this section, including specifically his right to cancel the contract in accordance with this section.

* * *

(4) Fail or refuse to honor any valid notice of cancellation by a buyer and within 10 business days after receipt of this notice to:

(a) Refund all payments made under the contract, except that if the buyer has received his first service under the contract the seller may retain or bill the buyer for ten dollars;

(b) Cancel and return any note, negotiable instrument, or other evidence of indebtedness executed by the buyer in connection with the contract and take any action necessary to reflect the termination of any security interest or lien created under the contract.

(c) Notify the buyer if the seller intends to repossess or abandon any evidence of membership or other goods provided to the buyer by the seller pursuant to the contract.

{¶ 26} The Contract contains a Notice of Cancellation at the bottom of the first page with the statutory language quoted above. We agree with Brogley, however, that a

"completed form, in duplicate," is not attached to the contract as required by R.C. 1345.44 (B)(1). The "purpose of the statutory cancellation form is to enable the consumer to sign, detach, and send in a copy, and keep one for his records." Ballard, Nadine, *Chapter 4, Prepaid Entertainment Contract Act, Ohio Consumer Law, Baldwin's Ohio Handbook Series*, pg. 186 (2014-15 Ed.) Given the fact that the Contract lacks the correct Notice of Cancellation, we conclude that Brogley's April 16, 2014 letter of cancellation was effective to cancel the Contract, since the period within which he could do so never began to run.

{¶ 27} Regarding EBF's assertion that it did not extend the period of time for a refund, we note that the Contract, at Section 5, which governs "YOUR CANCELLATION AND REFUND RIGHTS," provides: "E. If my cancellation entitles me or my estate to a refund, the Club will pay the refund within 30 days of its receipt of the written cancellation." While as EBF asserts, Sections B, C, and D of Section 5 address proportional refunds due to the death or disability of the buyer, and due to the relocation of the buyer or the facility, we cannot conclude that Section E of Section 5 only applies to a cancellation for reasons relating to death, disability or relocation, since Section E does not so specifically provide. As noted above, R.C. 1345.44(D)(1) provides that no seller shall "include in any contract * * * any waiver of any rights to which the buyer is entitled under this section, * * *," and R.C. 1345.44(D)(4) provides that the buyer is entitled to a refund of all payments made within 10 business days of a valid cancellation. We conclude that as a matter of law, the trial court correctly determined that the Contract violated R.C. 1345.44(D)(1), since by its plain language it expands the time period in which EBF was required to refund Brogley's payments upon a valid cancellation.

{¶ 28} Regarding EBF's assertion that the trial court erred in granting summary

judgment on the grounds that EBF failed to provide a full refund within 10 days of Brogley's cancellation, since we have determined that Brogley's letter of cancellation was effective, we disagree with EBF that it was not required to refund his payments, less ten dollars, under the Contract. In other words, as a matter of law, the trial court correctly determined that EBF violated R.C. 1345.44(D)(4)(a).

{¶ 29} Regarding EBF's assertion that R.C. 1345.44(D)(4)(b) does not require "written evidence" of cancellation to be sent to Brogley within 10 days of cancellation, we disagree. That section specifically requires EBF to cancel any note, negotiable instrument, *or other evidence of indebtedness* and return it to Brogley. The Contract reflects that Brogley completed a "Request for Preauthorized Payment" via credit card. Construing the evidence most strongly in favor of EBF, we conclude that Brogley is entitled to the cancellation and return of his Request for Preauthorized Payments, and that the trial court correctly found that EBF violated R.C. 1345.44(D)(4)(b).

{¶ 30} Regarding EBF's assertion that it did not violate R.C. 1345.44(D)(4)(c), which requires EBF to notify Brogley if it "intends to repossess or abandon any evidence of membership or other goods provided" to Brogley "*pursuant to the contract*," we note that the Contract (as well as Brogley's affidavit) is silent as to any evidence of membership or other goods provided to Brogley by EBF.[1] Construing the evidence most strongly in favor of EBF, we conclude that no genuine issue of material fact remains, and that the trial court erred in determining that EBF violated R.C. 1345.44(D)(4)(c).

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[1]We further note that R.C. 1345.44(D)(4)(c) appears to be in conflict with R.C. 1345.46, which provides in part that "Within twenty days after a prepaid entertainment contract has been canceled pursuant to sections 1345.41 to 1345.50 of the Revised Code, the buyer *upon demand* must deliver to the seller any evidence of membership or other goods provided to the buyer by the seller pursuant to the contract. * * *."

{¶ 31} EBF's second assigned error is sustained in part and overruled in part; the trial court's determination that EBF violated the CSPA by expanding the time period for a refund, by failing to timely refund Brogley's payments under the Contract (less ten dollars), and by failing to cancel evidence of Brogley's indebtedness, is affirmed. The trial court's determination that EBF violated the CSPA by failing to notify him of its intent to repossess or abandon evidence of membership is reversed.

{¶ 32} EBF's third assignment of error is as follows:

> THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING THAT [EBF] COMMITTED A KNOWING VIOLATION OF THE CSPA AND AWARDING ATTORNEY'S FEES AND STATUTORY DAMAGES.

{¶ 33} According to EBF, "An award of attorney's fees is inappropriate because Brogley failed to provide uncontested proof that [EBF] intentionally committed acts or practices that were deceptive, unfair or unconscionable." EBF further asserts that the "trial court's award of statutory damages was inappropriate because [Brogley] failed to provide undisputed proof that [EBF] committed acts that were deceptive, unfair, or unconscionable by rule or under applicable Ohio Case Law." According to EBF, the *Smith* matter attached to Brogley's motion for summary judgment does not support Brogley's claims.

{¶ 34} The trial court awarded attorney fees pursuant to R.C. 1345.09(F)(2) and R.C. 1345.48(B). R.C. 1345.09 provides: "(F) The court may award to the prevailing party a reasonable attorney's fee limited to the work reasonably performed and limited pursuant to section 1345.092 of the Revised Code, if either of the following apply: * * * (2) The supplier has *knowingly* committed an act or practice that violates this chapter."

(emphasis added).

{¶ 35} Having determined that the trial court correctly determined that EBF violated the CSPA as noted above, we will next consider whether the trial court correctly found that EBF did so "knowingly." R.C. 1345.01(E) provides that " 'Knowledge' means actual awareness, but such actual awareness may be inferred where objective manifestations indicate that the individual involved acted with such awareness." In *Shank v. Charger, Inc.*, 186 Ohio App.3d 605, 2010-Ohio-1129, 929 N.E.2d 520, ¶ 51-57 (2d Dist.), this Court noted as follows:

> After our decision in [*Bierlein v. Bernie's Motor Sales, Inc.*, 2d Dist. Montgomery No. 9590, 1986 WL 6757 (June 12, 1986)], the Ohio Supreme Court addressed the issue of what "knowingly" means in the context of R.C. 1345.01(E). See *Einhorn v. Ford Motor Co.* (1990), 48 Ohio St.3d 27, 548 N.E.2d 933. In *Einhorn*, the Ohio Supreme Court rejected a line of cases that would require a showing that the defendant must not only violate the [CSPA], but must know that his actions violate the act. Id. at 29-30, 548 N.E.2d 933. The court instead concluded the following regarding the purpose of the CSPA:
>
> "[I]t is better safeguarded by finding that 'knowingly' committing an act or practice in violation of R.C. Chapter 1345 means that the supplier need only intentionally do the act that violates the [CSPA]. The supplier does not have to know that his conduct violates the law for the court to grant attorney fees. * * *
>
> "* * *The language '* * *knowingly committed an act or practice that

violates this chapter' requires that for liability to attach, a supplier must have committed a deceptive or unconscionable act or practice. This conduct must violate the [CSPA]. The statutory language does not state that the supplier must act with knowledge that his acts violate the law, as appellee contends. 'Knowingly' modifies 'committed an act or practice' and does not modify 'violates this chapter.'

"To find otherwise would deny attorney fees to consumers even though the supplier might have blatantly violated the [CSPA]. Such a conclusion flies in the face of the common-law maxim that ignorance of the law is no excuse.

"Thus, pursuant to R.C. 1345.09(F)(2), a trial court may award a consumer reasonable attorney fees when the supplier in a consumer transaction intentionally committed an act or practice which is deceptive, unfair or unconscionable." (Citations omitted). *Einhorn*, 48 Ohio St.3d at 30, 548 N.E.2d 933.

The Ohio Supreme Court recently reaffirmed *Einhorn*, stating:

"Although both parties acknowledge that under the CSPA a plaintiff need prove only that the defendant intended to commit the act of violation and not that the conduct was intended to violate the act, we reiterate that the 'knowing' commission of an act that violates R.C. 1345 does not mandate imposition of attorney fees. The trial court has the discretion to determine whether attorney fees are warranted under the facts of each case. Therefore, we reaffirm *Einhorn* and hold that to establish a knowing

> violation of R.C. 1345.09, for an award of attorney fees, *a plaintiff need prove only that the defendant acted in a manner that violated the CSPA* and need not prove that the defendant knew that the conduct violated the law." (Emphasis added). *Charvat v. Ryan*, 116 Ohio St.3d 394, 2007-Ohio-6833, 879 N.E.2d 765, at ¶ 27.

{¶ 36} Construing the evidence most strongly in favor of EBF, we conclude that the trial court correctly determined that EBF knowingly violated the CSPA, and that the court did not abuse its discretion in determining that Brogley was entitled to an award of reasonable attorney fees pursuant to R.C. 1345.09(F)(2).

{¶ 37} R.C. 1345.48(B), pursuant to which the trial court also awarded Brogley double damages and attorney fees, provides as follows: "If the seller of a prepaid entertainment contract fails to comply with division (D)(4)(a) of section 1345.44 of the Revised Code, the buyer may recover the amount of money due him under that section and, in addition, may recover damages in an amount equal to the amount of money due to him and reasonable attorney's fees." Having determined that EBF violated R.C. 1345.44(D)(4)(a), we conclude that the trial court properly awarded Brogley $1,802.66, and that the court did not abuse its discretion in determining that Brogley was entitled to reasonable attorney fees pursuant to R.C. 1345.48(B).

{¶ 38} Regarding EBF's assertion that the remaining damages were inappropriate, R.C. 1345.09(B), pursuant to which the trial court awarded Brogley $5,000.00 in noneconomic damages as well as $800.00 for four CSPA violations (two of which we have concluded were not violations), provides as follows:

> Where the violation was an act or practice declared to be deceptive

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

{¶ 39} R.C. 1345.05(A) provides that the attorney general shall:

* * *

(3) Make available for public inspection all rules and all other written statements of policy or interpretations adopted or used by the attorney general in the discharge of the attorney general's functions, together with all judgments, including supporting opinions, by courts of this

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[2]" ' "Actual damages" are defined as "real, substantial, and just damages, or the amount awarded to a complainant in compensation for his actual and real loss or injury." ' *Crow v. Fred Martin Motor Co.,* 9th Dist. No. 21128, 2003-Ohio-1293, 2003 WL 1240119, at ¶ 32, quoting Black's Law Dictionary." *Whitaker v. M.T. Automotive*, *Inc.*, 111 Ohio St.3d 177, 2006-Ohio-5481, 855 N.E.2d 825, ¶ 18.

[3] Non-economic loss includes "pain and suffering, loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education, disfigurement, mental anguish, and any other intangible loss." R.C. 2315.18(A)(4).

> state that determine the rights of the parties and concerning which appellate remedies have been exhausted, or lost by the expiration of the time for appeal, determining that specific acts or practices violate section 1345.02, 1345.03, or 1345.031 of the Revised Code.

{¶ 40} In *Bodenberg v. Duggan Homes*, 2d Dist. Montgomery No. 20311, 2004-Ohio-5935, this Court addressed the application of R.C. 1345.09(B) to a request for damages. Therein, the magistrate denied Bodenburg's request for treble damages pursuant to R.C. 1345.09(B), and the trial court agreed, concluding in part that "Bodenburg failed to offer any evidence that similar violations occurred in cases available for viewing in the Attorney General's public inspection file as specified under R.C. 1345.05(A)(3)." *Id*., ¶ 14. On appeal, in affirming the trial court, this Court noted that "[s]everal Ohio courts have found that the language contained in [R.C. 1345.05(A)(3)] makes it an element to prove treble damages, that evidence must be established and provided to the trial court that such decision of the violation of the act is contained in the [Attorney General's Public Inspection File ('PIF')]. * * *." *Id*., ¶ 21. This Court disagreed "with Bodenburg's characterization that their burden of proof was fulfilled simply by the existence of the decision in the Attorney General's PIF. We agree with the trial court and the magistrate that Bodenburg failed to produce evidence at the time of the trial that such decisions were contained in the PIF." *Id*., ¶ 24.

{¶ 41} We agree with EBF that the *Smith* decision, while contained in the PIF, did not determine that any specific acts or practices violate the CSPA, but rather granted default judgment based upon the failure of the defendant to answer or appear. Since Brogley failed to establish the existence of a previous decision from a court in this State in

the PIF relative to his CSPA violations, we conclude as a matter of law that Brogley is not entitled to damages pursuant to R.C. 1345.09(B).

{¶ 42} For the foregoing reasons, EBF's third assigned error is sustained in part and overruled in part; the damages and reasonable attorney fees awarded pursuant to R.C. 1345.48 are affirmed, and the damages awarded pursuant to R.C. 1345.09 are reversed.

{¶ 43} The judgment of the trial court is affirmed in part and reversed in part consistent with the analysis herein and remanded for modification of the judgment accordingly.

. . . . . .

FROELICH, P.J., and WELBAUM, J., concur.

Copies mailed to:

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Hon. James D. Piergies