[Cite as *Utley v. M. T. Automotive, Inc.*, 2009-Ohio-5161.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

PAMELA UTLEY, et al. Appellees v. M. T. AUTOMOTIVE, INC. dba MONTROSE TOYOTA Appellant	C.A. Nos. 24482 and 24483 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV 06 11 7101

DECISION AND JOURNAL ENTRY

Dated: September 30, 2009

CARR, Presiding Judge.

{¶1} Appellant, M.T. Automotive, Inc., dba Montrose Toyota, appeals from a judgment of the Summit County Court of Common Pleas on a Consumer Sales Practices Act claim filed against it by Appellees, Pamela and David Utley. In a separate appeal, Appellant, Throse, LLC, appeals from that aspect of the trial court's judgment that denied its request for an award of attorney fees. This Court affirms in part and reverses in part.

I.

{¶2} On August 5, 2006, Pamela and David Utley went to Montrose Toyota to purchase an automobile for Mrs. Utley. After taking a test drive and negotiating the sale with Montrose Toyota salespeople, the Utleys agreed to purchase a 2007 Solara for $24,059.00. After Mrs. Utley had signed much of the necessary paperwork, but before she had signed a sales agreement, Montrose Toyota personnel presented her with an agreement entitled a "JURY WAIVER AND AGREEMENT TO BINDING ARBITRATION." Mr. Utley, an attorney,

reviewed the agreement and advised his wife to refuse to sign it. Because Mrs. Utley would not sign the arbitration agreement, Montrose Toyota refused to complete the sale. The following day, the Utleys purchased a comparable vehicle from another dealer that did not require them to sign any type of arbitration agreement.

{¶3} The Utleys filed this action against M.T. Automotive and Michael Thompson,[1] the majority shareholder of M.T. Automotive, alleging that the defendants had violated Ohio's Consumer Sales Practices Act by refusing to sell them an automobile unless they signed its form arbitration agreement. They sought a declaration that, by requiring all customers to sign the jury waiver and arbitration form, M.T. Automotive was committing an unfair, deceptive, and/or unconscionable act under R.C. Chapter 1345. They further sought damages, attorney fees, and injunctive relief to prevent the Montrose Toyota dealership from continuing to use the arbitration form as a mandatory part of its sales agreements.

{¶4} The Utleys later joined another defendant, Throse LLC, who had since become the owner of the Montrose Toyota dealership. The trial court ultimately granted summary judgment to Throse, however, because Throse did not exist at the time of the incident and M.T. Automotive still owned a majority interest in the dealership.

{¶5} Following a bench trial, the trial court granted the Utleys declaratory relief, holding that M.T. Automotive's use of the arbitration form in this case constituted an unfair and deceptive practice in violation of R.C. 1345.02(B)(10). The trial court based its finding on this Court's decision in *Eagle v. Fred Martin Motor Co.*, 157 Ohio App.3d 150, 2004-Ohio-829. Although the court found that the Utleys had failed to establish any actual damages, it granted

[1] The Utleys later dismissed Thompson from the case and he is not a party to this appeal.

injunctive relief, and found that the Utleys were entitled to reasonable attorney fees. After a hearing on the amount of attorney fees, the trial court approved an award of $119,542.79. Throse had also counterclaimed for an award of attorney fees, but the trial court denied its request, because it concluded that the Utleys and their attorneys had a good faith belief that their action against Throse had potential merit.

{¶6} M.T. Automotive and Throse separately appealed and the appeals were later consolidated. M.T. Automotive raises four assignments of error and Throse raises three. M.T. Automotive's assignments of error will be addressed first.

M.T. AUTOMOTIVE'S ASSIGNMENT OF ERROR I

> "THE TRIAL COURT ERRED AS A MATTER OF LAW BY DETERMINING THAT THE PARTIES ENGAGED IN A CONSUMER TRANSACTION WITHIN THE MEANING OF THE OHIO CONSUMER SALES PRACTICES ACT."

{¶7} M.T. Automotive's first assignment of error is that the trial court erred in denying its motion for summary judgment. Pursuant to Civ.R. 56(C), summary judgment is proper if:

> "(1) [N]o genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the nonmoving party." *State ex. rel. Howard v. Ferreri* (1994), 70 Ohio St.3d 587, 589.

"'Doubts must be resolved in favor of the nonmoving party.'" *Horton v. Harwick Chem. Corp.* (1995), 73 Ohio St.3d 679, 686, quoting *Davis v. Loopco Industries, Inc.* (1993), 66 Ohio St.3d 64, 66.

{¶8} M.T. Automotive moved for summary judgment and argued, among other things, that the Utleys had no claim under the Consumer Sales Practices Act because they did not purchase a vehicle from M.T. Automotive. M.T. Automotive maintained that, without an actual

sale, there was no "consumer transaction" under the Consumer Sales Practices Act. M.T. Automotive cited no authority to support its argument, however, nor was this Court able to find any.

{¶9} R.C. 1345.01(A) defines a consumer transaction as "a sale, lease, *** or other transfer of an item of goods *** to an individual for purposes that are primarily personal *** or solicitation to supply any of these things." The definition expressly includes a "solicitation" for the sale of consumer goods, in addition to the completed sale.

> "From this language, it is apparent that under the Consumer Sales Practices Act it is not necessary that a sale actually take place before a supplier may be held liable to a consumer for deceptive acts. A solicitation to sell goods *** may be sufficient to give rise to liability even in the absence of an actual sale if a deceptive act is committed in connection with that solicitation." *Weaver v. J.C. Penney Co.* (1977), 53 Ohio App.2d 165, 168-169.

{¶10} This Court has held that "[w]hether the deceptive representation takes place before, during, or after the service or sale, the statute is nonetheless applicable." *Brown v. East Ohio Heating Co.* (Sept. 13, 1981), 9th Dist. No. 10176. An automobile dealer's actions in negotiating its sales agreement can constitute "solicitation" within the meaning of R.C. 1345.01(A), even if no sale is completed. *McDonald v. Bedford Datsun* (1989), 59 Ohio App.3d 38, 41.

{¶11} M.T. Automotive has failed to demonstrate that the trial court erred in rejecting its argument that that its attempt to sell a vehicle to the Utleys, because it did not culminate in a completed sale, failed to constitute a "transaction" under the Consumer Sales Practices Act. Consequently, the trial court did not err in denying summary judgment on that basis. M.T. Automotive's first assignment of error is overruled.

M.T. AUTOMOTIVE'S ASSIGNMENT OF ERROR II

"THE TRIAL COURT ERRED IN DETERMINING AS A MATTER OF LAW THAT [M.T. AUTOMOTIVE'S] USE OF THE ARBITRATION AGREEMENT CONSTITUTED AN UNFAIR OR DECEPTIVE ACT OR PRACTICE PURSUANT TO R.C. 1345.02."

{¶12} M.T. Automotive's second assignment of error is that the trial court erred in its legal conclusion that this Court's decision in *Eagle v. Fred Martin Motor Co.*, 157 Ohio App.3d 150, 2004-Ohio-829, constituted binding precedent in this case. This Court agrees that the trial court erred in basing its decision on a misconstruction of the *Eagle* decision. The *Eagle* decision did not address the issue of whether an automobile dealership's use of an arbitration form in its sales transactions constituted an unfair or deceptive act or practice, as that issue was not before this Court on appeal.

{¶13} *Eagle* was an appeal from a trial court judgment that referred a case to binding arbitration, based on an arbitration form that Ms. Eagle signed when she purchased a vehicle from Fred Martin. Although Ms. Eagle's underlying claims alleged that Fred Martin had committed violations of the Consumer Sales Practices Act, the trial court did not rule on the merits of her claims, but instead referred the matter to arbitration. The only issue decided by the trial court was that the matter would proceed to arbitration because the arbitration agreement was binding and enforceable. Because the trial court's judgment had not reached the merits of Ms. Eagle's consumer claims, those issues were not before this Court on appeal.

{¶14} The sole issue on appeal in *Eagle* was whether Ms. Eagle was bound by the arbitration form that she signed when she purchased her vehicle from Fred Martin. The focus of this Court's analysis was on the enforceability of the arbitration form, not on the dealership's act of requiring purchasers to sign it. In fact, this Court emphasized that, "while it is conceivable that a complainant may allege that an arbitration clause itself may violate R.C. Chapter 1345,

Ms. Eagle does not raise her arbitration clause argument in this manner[.]" Id. at ¶28. This Court then proceeded to analyze the enforceability of the arbitration form "under the law of contracts, rather than R.C. Chapter 1345 itself." Id.

{¶15} Based on over 40 pages of detailed analysis of the entire arbitration form and the specific facts of Ms. Eagle's case, this Court held that the arbitration form was unconscionable and unenforceable against Ms. Eagle. Although the Utleys and the trial court quoted language from *Eagle* that might suggest otherwise, this Court did not reach the legal issue of whether the dealership's use of the arbitration form constituted an unfair or deceptive act or practice under the Consumer Sales Practices Act. Because Ms. Eagle was attempting to litigate a Consumer Sales Practices Act claim, there is language in the opinion that refers to Ohio's Consumer Sales Practices Act. A full reading of this language within the context of the 48-page opinion, however, reveals that this Court was focusing on the spirit and policy behind the Act and whether, as a whole, the arbitration form at issue should be enforced.

{¶16} The trial court's decision in this case appears to be driven by its misinterpretation of *Eagle* as having found a violation of the Consumer Sales Practices Act under either R.C. 1345.01 or 1345.02. The trial court notes merely that *Eagle* "did not specify which section of the CSPA was violated." In fact, this Court's *Eagle* decision did not determine whether the dealership's use of the arbitration form in that case constituted an unfair or deceptive act or practice under the Consumer Sales Practices Act, as that issue was not before this Court on appeal.

{¶17} Moreover, as found by the trial court, the only similarity between the arbitration clause at issue in *Eagle* and the clause presented to the Utleys was the portion of the clause that waived their right to proceed through a class action or as a private attorney general in arbitration.

The *Eagle* court did not address the specific question of whether that language, standing alone, was unenforceable as a matter of law. In other words, this Court has never addressed the question of whether a consumer's waiver of private attorney general and class action rights under the CSPA in unenforceable in all situations. Because some courts have held that such a provision is enforceable, see, e.g., *Hawkins v. O'Brien*, 2d Dist. No. 22490, 2009-Ohio-60, at ¶31-34, this was a debatable legal issue that should have been independently determined by the trial court in the first instance. It is unclear to what extent its decision was impacted by its apparent belief that it was bound by *Eagle* to conclude that the dealership's use of the private attorney general and class action waiver provision constituted a CSPA violation. Because the trial court may have reached a different conclusion if it had applied its independent judgment on this issue, this Court cannot conclude that its erroneous interpretation of *Eagle* was not prejudicial to M.T. Automotive. Therefore, the judgment on the Utleys' claims must be reversed and remanded for the trial court to make its own determination of whether the dealership committed an unfair or deceptive act or practice through its use of the arbitration form in this case. M.T. Automotive's second assignment of error is sustained.

M.T. AUTOMOTIVE'S ASSIGNMENT OF ERROR III

"THE VERDICT WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE, AS A MATTER OF LAW, AND/OR WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

M.T. AUTOMOTIVE'S ASSIGNMENT OF ERROR IV

"THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING PLAINTIFFS ATTORNEY'S FEES AND EXPENSES IN THE AMOUNT OF $119,542.79."

{¶18} Because M.T. Automotive's third and fourth assignments of error have been rendered moot by this Court's disposition of its second assignment of error, they will not be addressed. See App.R. 12(A)(1)(c).

THROSE'S ASSIGNMENT OF ERROR I

"THE TRIAL COURT ERRED BY DETERMINING THAT PLAINTIFFS DID NOT ENGAGE IN FRIVOLOUS CONDUCT WITHIN THE MEANING OF R.C. 2323.51."

THROSE'S ASSIGNMENT OF ERROR II

"THE TRIAL COURT ERRED IN DENYING THROSE, LLC ATTORNEY'S FEES PURSUANT TO R.C. 1345.09(F) WHERE PLAINTIFFS BROUGHT AND MAINTAINED IN BAD FAITH A GROUNDLESS ACTION AGAINST IT."

THROSE'S ASSIGNMENT OF ERROR III

"THE TRIAL COURT ERRED IN DENYING THROSE, LLC'S MOTION FOR SANCTIONS UNDER CIV.R. 11."

{¶19} Through its three assignments of error, Throse maintains that the trial court erred in denying its counterclaims for attorney fees under R.C. 2323.51, R.C. 1345.09(F), and/or Civ.R. 11. Because each of the counterclaims involve similar analysis, Throse's three assignments of error will be addressed together.

{¶20} Pursuant to R.C. 2323.51, a trial court may award attorney fees incurred in connection with the civil action to any party to the civil action who was adversely affected by frivolous conduct. R.C. 2323.51(A)(2)(a) defines "frivolous conduct" to include conduct that "serves merely to harass *** or is for another improper purpose[;]" conduct that is "not warranted under existing law" or cannot be argued in good faith to be legally supported; or conduct that "consists of allegations *** that have no evidentiary support or *** are not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." R.C. 2323.51(A)(2)(a)(i) - (iii).

{¶21} R.C. 1345.09(F) authorizes the trial court to award attorney fees to a prevailing defendant in a Consumer Sales Practices Act case if the court finds that "[t]he consumer complaining of the act or practice that violated this chapter has brought or maintained an action that is groundless, and the consumer filed or maintained the action in bad faith[.]"

{¶22} Finally, Civ.R. 11 provides that an attorney's signature on every pleading, motion, or other legal document certifies that the attorney "has read the document[,][and][ ] to the best of the attorney's *** knowledge, information, and belief there is good ground to support it[.]" An attorney who willfully violates the rule may be ordered to pay the opposing party's attorney fees. *Riston v. Butler*, 149 Ohio App.3d 390, 2002-Ohio-2308, at ¶9. Employing a subjective bad faith standard, the attorney's actual intent or belief determines whether his conduct was willful. Id.

{¶23} Basically, each of its counterclaims for attorney fees required Throse to prove that the Utleys had brought claims against it in bad faith, knowing that their claims had no potential merit. The trial court found, however, that at the time the Utleys joined Throse as a defendant in this case, they had a good faith belief that it may have been a proper defendant as a successor in interest to M.T. Automotive and that it was not until after much discovery that it became apparent that Throse had no liability to them.

{¶24} On appeal, Throse disputes the trial court's finding that the Utleys did not act in bad faith by joining Throse in this action. Throse contends that, if the Utleys checked corporate filing records on the website of the Ohio Secretary of State, as they maintained that they did, they should have known before they filed this action that Throse did not exist as a corporate entity until October 2006, after the August 5 transaction at issue. Thus, it contends that the Utleys acted in bad faith by joining Throse in this action.

{¶25} The Utleys presented evidence that, until they were able to conduct extensive discovery, they were uncertain about the exact date that Throse became the owner of the Montrose Toyota dealership. They had received mixed information about when ownership of Montrose Toyota transferred from M.T. Automotive to Throse, apparently because the closing date of the sale was delayed. On the day of the August 5 transaction, the Utleys were approached by a man named Bradley Wolkov, a representative of Throse, who thanked them for their business and represented to them that Montrose Toyota already was under new ownership. The Utleys also discovered other documentation that tended to suggest that Throse may have existed before the August 5 transaction. It was not until long after filing this action that the Utleys definitively learned that M.T. Automotive, not Throse, was the owner of Montrose Toyota on the day of the transaction.

{¶26} The Utleys also presented evidence that initially they were uncertain about the legal relationship between M.T. Automotive and Throse. One of their attorneys testified that, based on his legal research and information that he learned through initial discovery, he reasonably believed that the Utleys needed to join Throse to seek injunctive relief. Throse was the entity that then owned Montrose Toyota and was still using the arbitration form as part of its sales agreements. The attorney also had learned that Throse had been created, in part, to avoid liability in consumer cases. He did not realize until much later in the discovery process that M.T. Automotive owned 75 percent of Throse and that the liability of M.T. Automotive continued in the new entity.

{¶27} There was also evidence that the Utleys' efforts to focus on the correct defendant had been impeded, at least in part, by the defendants' refusal to provide them with information. Before filing this case, one of the Utleys' attorneys contacted Montrose Toyota to obtain copies

of the documents from its transaction with the Utleys, but the attorney for the dealership refused to comply with his request. After the Utleys filed this action, M.T. Automotive and Throse continued to be uncooperative by refusing to provide discovery documents, threatening to prolong the litigation, and by filing repeated motions for sanctions against the Utleys and their counsel. The Utleys' counsel testified that, in his ten years' experience litigating consumer cases, he had never met with this much resistance in discovery. He explained that the discovery in this case "developed a life of its own."

{¶28} The trial court heard ample evidence at the hearing on Throse's counterclaims to support its conclusion that the Utleys had acted on a good faith belief that Throse was a potential defendant in this case. Therefore, it did not err in denying Throse's request for attorney fees. Throse's three assignments of error are overruled.

III.

{¶29} The second assignment of error of M.T. Automotive is sustained. Its first assignment of error is overruled and its remaining assignments of error were not addressed because they had been rendered moot by this Court's disposition of M.T. Automotive's second assignment of error. Throse's three assignments of error are overruled.

{¶30} This cause is remanded for the trial court to determine, in the first instance, whether M.T. Automotive violated the Consumer Sales Practices Act by its use of the arbitration form at issue.

Judgment affirmed in part,
and reversed in part,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed equally to all parties.

DONNA J. CARR
FOR THE COURT

WHITMORE, J.
CONCURS

BELFANCE, J.
CONCURS IN PART AND DISSENTS IN PART, SAYING:

{¶31} I respectfully dissent from the majority's disposition of M.T. Automotive's second assignment of error. M.T. Automotive's second assignment of error presents a clear issue of law, namely, whether the trial court erred as matter of law in finding that M.T. Automotive's use of the arbitration agreement constituted an unfair or deceptive practice under the CSPA. This Court reviews purely legal questions under a de novo standard of review. *Akron-Canton Waste Oil, Inc. v. Safety-Kleen Oil Serv., Inc.* (1992), 81 Ohio App.3d 591, 602.

Under the de novo standard of review, an appellate court does not give deference to a trial court's decision. *Akron v. Frazier* (2001), 142 Ohio App.3d 718, 721.

{¶32} In my view, the majority has erroneously concluded that the trial court's decision should be reversed because its ultimate legal conclusion was based upon the faulty legal premise that under *Eagle v. Fred Martin Motor Co.*, 157 Ohio App.3d 150, 2004-Ohio-829, it was compelled to conclude that there was a violation of the CSPA. However, even if the trial court misapprehended or misapplied *Eagle*, such an error is not dispositive of our de novo review of a question of law because it is well established in Ohio that "a reviewing court is not authorized to reverse a correct judgment merely because erroneous reasons were assigned as a basis thereof." *State ex rel. Carter v. Schotten* (1994), 70 Ohio St.3d 89, 92. Further, this Court has held that "an appellate court shall affirm a trial court's judgment that is legally correct on other grounds, that is, one that achieves the right result for the wrong reason, because such an error is not prejudicial." *Cook Family Invests. v. Billings*, 9th Dist. Nos. 05CA008689 & 05CA008691, 2006-Ohio-764, at ¶19.

{¶33} Upon review of the trial court's journal entry, I cannot conclude that there is reversible error. I agree that this Court's primary analysis in *Eagle* was regarding the enforceability of the arbitration provision in that case and that the *Eagle* court did not expressly hold that the clause constituted an unfair or deceptive practice under the CSPA. However, it is evident from the judgment entry that the trial court was aware of this distinction. Moreover, *Eagle* also directly addressed the enforceability of the portion of the arbitration clause that waived the consumer's right to proceed through a class action or as a private attorney general in arbitration. This Court explicitly found the class action and private attorney general waiver

clause, virtually identical to the one at issue here, to be unenforceable, in part, because it "clearly invades the policy considerations of the CSPA." *Eagle* at ¶74.

{¶34} In its decision, the trial court accurately observed that in *Eagle,* this Court, using contract analysis, found that the arbitration clause was unconscionable and hence unenforceable. The trial court also properly noted that the *Eagle* Court continued to analyze whether the form was unenforceable as a matter of public policy and that this Court concluded that "by expressly eliminating a consumer's right to proceed through a class action or as a private attorney general in arbitration, the arbitration clause directly hinders the consumer protection purposes of the CSPA," and as a result such a contract would not be enforced. *Eagle* at ¶73. The trial court also accurately noted that this Court expressly stated in *Eagle* that the arbitration clause "as written violates the CSPA," and further observed that the *Eagle* Court did not specify which section of the CSPA was violated. Based upon these observations, the trial court distinguished *Eagle* from this matter and concluded that it could not find, as we did in *Eagle,* that the arbitration clause was unconscionable as a matter of contract law. However, the trial court, correctly stated that *Eagle* held that the arbitration clause prohibiting consumers from participating in class actions or acting as private attorney general in claims against a supplier is a violation of public policy and unenforceable. In light of these legal conclusions in *Eagle,* the trial court properly reasoned that M.T. Automotive's continued practice of requiring its customers to sign a form that was almost identical to the form at issue in *Eagle,* which it knew had been held unconscionable as a matter of contract law and which it knew to be unenforceable as a violation of the public policy of the CSPA, was an unfair and deceptive practice. In reaching this legal conclusion, I do not believe that the trial court's accurate observations of *Eagle* created a faulty premise upon which it ultimately based its decision. Further, even if the trial court misconstrued *Eagle,* ultimately, it

reached the correct legal result in determining as a matter of law that M.T. Automotive's practice of requiring its customers to sign a waiver of rights as a condition precedent to the purchase of an automobile, that it knew was not legally enforceable and in violation of public policy, constituted an unfair and deceptive practice under the CSPA.

{¶35} For these reasons, I would overrule M.T. Automotive's second assignment of error and reach the merits of its third and fourth assignments of error. I concur in the majority's disposition of M.T. Automotive's first assignment of error and Throse's assignments of error.

APPEARANCES:

JOSEPH T. DATTILO, JOHN C. FICKES, CAROLINE L. MARKS, Attorneys at Law, for Appellants.

ROCCO P. YEARGIN, Attorney at Law, for Appellees.