

IN THE SUPREME COURT OF OHIO

REYNOLD WILLIAMS, JR.,

Appellee,

vs.

**SPITZER AUTOWORLD CANTON,
LLC,**

Appellant.

CASE NO.: 2008-1337

**On Appeal from the
Stark County Court of Appeals,
Fifth Appellate District,
Case No. 07CA00187**

APPELLEE'S MEMORANDUM OPPOSING JURISDICTION

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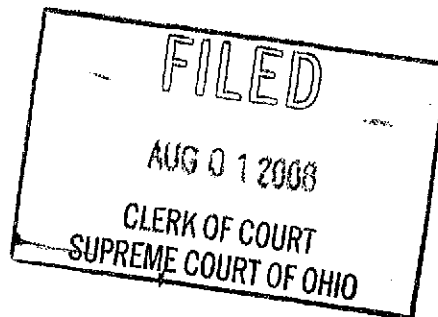


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III. THIS CASE DOES NOT PRESENT A SUBSTANTIAL CONSTITUTIONAL QUESTION OR A MATTER OF GREAT PUBLIC OR GENERAL INTEREST

There are no unsettled, controversial or constitutional issues presented by this case.

Appellant, Spitzer AutoWorld Canton, LLC, challenges an evidentiary ruling by the trial court that was subsequently upheld by the Fifth District Court of Appeals. Because both courts below properly construed and applied a long-established axiom of consumer protection law, this case does not present any question of public or great general interest and does not involve any substantial constitutional question for review by this Court. See *Noble v. Colwell* (1989), 44 Ohio St.3d 92, 94; Section 2(B)(2)(e), Article IV of the Ohio Constitution; S.Ct. Rule II, §1(A)(2)&(3).

While Appellant has made *pro forma* statements that the case involves a substantial constitutional issue, no reference to any constitutional provision appears in the Memorandum in Support of Jurisdiction. Significantly, no constitutional issue was raised by Appellant either at trial or in the court of appeals and, therefore, this Court should refuse to consider any constitutional issue Appellant might raise for the first time in this Court. *State v. Lynn* (1966), 5 Ohio St.2d 106 (paragraph six of syllabus).

Furthermore, this case neither presents harm to the public nor creates any great general interest.

Appellant simply cannot accept the conclusion of the jury that Appellant knowingly violated the Consumer Sales Practice Act, O.R.C. 1345.01 *et seq.* ("CSPA"). As argued in the court of appeals, Appellant again implies that the weight of the facts (as interpreted by Appellant) should have led the jury to a more palatable verdict. Appellant also now presents itself as some sort of white knight protecting the sanctity of all Ohio businesses -- despite not only the jury's unanimous verdict, but also undisputed evidence at trial of forgeries and of a

prohibited consumer practice that is based on a case bearing the Spitzer name (i.e., *Gross v. Spitzer Buick Company* (Dec. 22, 1998), Summit C.P. No. CV-97-09-4942 [PIF#10001725] (prohibiting suppliers from having consumers sign blank credit applications).

This case presents only the application of a long settled principle of consumer protection law (i.e., the admissibility of parol evidence in consumer protection cases) and case-specific questions of fact that are of limited interest to anyone except the two parties. As noted by Chief Justice Moyer, in his concurring opinion in *State v. Urbin*, 100 Ohio St.3d 1207, 2003-Ohio-5549, a proposition of law grounded in the appellant's belief the trial court erred in admitting certain evidence represents "a case-specific issue of no general interest" under Section 2(B)(2)(e), Article IV of the Ohio Constitution. *Id.* at ¶5.

Further, contrary to the dramatic rhetoric of Appellant, the decisions of the courts below were neither revolutionary nor unexpected. On the other hand, adoption of Appellant's proposition of law would impose an unprecedented and particularly suspect alteration to the operation of the CSPA. It would reward suppliers who are adept at deceiving consumers by providing such suppliers with an easy defense to any consumer claim, no matter how egregious the conduct. Under application of Appellant's proposition of law, so long as the supplier had the right piece of paper with the consumer's signature on it, courts would be required to ignore not only evidence of suppliers' wrongful acts, but also the legislative intent behind and the statutory language of the CSPA.

Appellant's Amicus, the Ohio Automobile Dealers Association, similarly attempts to arouse specters of economic doom of the type which have been raised since the CSPA was first proposed almost four decades ago. Such phantom menaces are not likely to spring spontaneously into being as a result of this case. However, even if there was evidence of used car

dealers and the like streaming from Ohio into Kentucky, Indiana, etc., Appellant is really arguing for a change in the underlying public policy which generated Ohio's consumer protection legislation. Such policy arguments are best suited for the attention of the legislature. "A fundamental principle of the constitutional separation of powers among the three branches of government is that the legislative branch is 'the ultimate arbiter of public policy.'" *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948 at ¶21 [citation omitted]. The CSPA is not about contracts, but the wrongful conduct of suppliers. The CSPA has always allowed the introduction of evidence which otherwise might be excluded as parol evidence and any proposed change in that policy should instead be considered (if at all) by Ohio's legislature.

This case turned on whether the jury believed Appellee could reasonably rely on the statements made by Appellant and that those representations were unfair, deceptive or unconscionable as defined by the CSPA. The sanctity of contract law is not in jeopardy and any argument to modify the breadth of the underlying public policy should be addressed by the General Assembly. Until then, the existing legislative intent and statutory language is clear. For any one of these reasons alone, the Court should decline jurisdiction in this appeal.

IV. STATEMENT OF CASE AND FACTS

This was a relatively typical CSPA case involving the purchase of a motor vehicle. There was evidence of numerous questionable actions on the part of Appellant, including (but not limited to) misrepresentations. For reasons not relevant to this appeal, the only complaint at issue at this stage is whether, unbeknownst to Appellee, Appellant inserted into the written purchase agreement a lower value for Appellee's trade-in than the parties had agreed upon.

On this very issue of fact, the jury returned a verdict in favor of the Appellee, Reynold Williams, Jr., and against Appellant, Spitzer AutoWorld of Canton, LLC, specifically finding Appellant had knowingly violating the CSPA and awarding damages in the amount of \$2,500. In accordance with O.R.C. 1345.09(B), the jury award was later trebled by the trial court. After a subsequent series of motions from both parties, the trial court issued four separate judgment entries disposing of all the post-verdict issues on June 29, 2007.

Appellant filed its notice of appeal with the Fifth District Court of Appeals on July 3, 2007, raising a number of assignments of error, only one of which has survived to this level. Issues arising from the cross-appeal, regarding sufficiency of the trial court's award of attorney's fees, are likewise no longer pertinent. On May 27, 2008, the Court of Appeals issued its decision and entry in favor of Appellee. It is this decision, in relevant part, which Appellant has now appealed to this Court.

V. LAW AND ARGUMENT

Appellant's Proposition of Law No. 1:

Parol evidence cannot be offered by a party in a claim brought under the Consumer Sales Practices Act to alter the term of a written contract where that term is clear and unambiguous.

Appellant argues the trial court should have applied O.R.C. 1302.05, the parol evidence rule, to exclude Appellee's testimony as to the agreed-upon terms of the vehicle purchase. Since this would contravene a well-established tenet of the CSPA that allows the introduction of oral representations and promises into evidence in consumer protection litigation, Appellant's proposition (at a more fundamental level) represents a full scale assault on both the public policies which underpin the CSPA and the statutory authority of the Ohio Attorney General to promulgate regulations to enforce the CSPA. The arguments of Appellant and its Amicus also are contrary to basic tenets of statutory construction and all CSPA precedent.

The CSPA broadly prohibits all deceptive, unfair or unconscionable acts or practices in consumer transactions. As this Court recently emphasized again:

The CSPA "is a remedial law which is designed to compensate for traditional consumer remedies and so must be liberally construed pursuant to O.R.C. 1.11." *Einhorn v. Ford Motor Co.* (1990), 48 Ohio St.3d 27, 29, 548 N.E.2d 933.

Whitaker v. M.T. Automotive, Inc., 111 Ohio St.3d 177, 2006-Ohio-5481 at ¶ 11 [emphasis added]. "The purpose of the CSPA is to protect consumers from 'unscrupulous suppliers' in a manner not afforded under the common law." *Elder v. Fischer* (1998), 129 Ohio App.3d 209 [emphasis added], appeal denied (1998), 84 Ohio St.3d 1434, 702 N.E.2d 1213, citing *State ex rel. Celebrezze v. Howard* (1991), 77 Ohio App.3d 387, 393-94, 602 N.E.2d 665; see also "Fraud, Deception, and Other Abuses in Consumer Sales & Services", L.S.C. Report No. 102 (January, 1971) (Pre-CSPA law was "of limited value to the injured consumer because of difficulties in procedure and proof." *Id.* at 2). Appellant fails to grasp the fundamental concept

that the CSPA is not founded on principles of common law fraud or even codified contract law, but rather the legislature created a separate statutory scheme governing consumer sales practices. *Johnson v. Microsoft Corp.*, 106 Ohio St.3d 278, 2005-Ohio-4985 at ¶25. The CSPA was crafted to focus on the misconduct of the supplier, not the sophistication of the supplier's contracts. As a result, contract and common law defenses do **not** generally apply to CSPA claims. *Wall v. Planet Ford, Inc.*, 2005-Ohio-1207 at ¶¶25-26, appeal denied 106 Ohio St.3d 1464, 2005-Ohio-3490; *Gallagher v. WMK Inc.*, 2007-Ohio-6615 at ¶24. The act or practice is to be considered from the point of view of the consumer and is an issue of fact to be decided from all the relevant facts and circumstances in a given case. *Wall, supra* at ¶21.

The proper application of the CSPA arises not only from the underlying public policy, but also from the statutory language itself. O.R.C. 1345.02(A) declares:

No supplier shall commit an unfair or deceptive act or practice in connection with a consumer transaction. Such an unfair or deceptive act or practice by a supplier violates this section **whether it occurs before, during, or after the transaction.** [Emphasis added.]

This core provision of the CSPA anticipates the existence of collateral oral misrepresentations inconsistent with the rights, remedies or obligations set forth in a written contract – and makes such misrepresentations unlawful. Likewise, in determining whether a supplier's conduct amounts to unconscionable practices under O.R.C. 1345.03, the admission of parol evidence is often essential. See, e.g., O.R.C. 1345.03(A); O.R.C. 1345.03(B)(1)&(6). The General Assembly clearly intended that the CSPA provide an avenue for aggrieved consumers to overcome defenses based on traditional contract principles, **particularly** the parol evidence rule.

More specific to this appeal, under statutory authority, the Attorney General has promulgated O.A.C. 109:4-3-16, which defines certain deceptive practices in regard to the advertisement and sales of motor vehicles, including:

(B) It shall be a deceptive and unfair act or practice for a dealer, manufacturer, advertising association, or advertising group, in connection with the advertisement or sale of a motor vehicle, to:

22) Fail to integrate into any written sales contract, all material statements, representations or promises, oral or written, made prior to obtaining the consumer's signature on the written contract with the dealer; [Emphasis added.]

Notwithstanding the “parent” statutory provisions discussed above, O.A.C. 109:4-3-16(B)(22) clearly imposes liability upon the seller of motor vehicles for certain statements that arguably would otherwise be inadmissible in court due to the parol evidence rule. Like the CSPA itself, this Rule should be liberally construed. O.A.C. 109:4-3-01; *Renner v. Proctor & Gamble Co.* (1988), 54 Ohio App.3d 79, 86, 561 N.E.2d 959. “An administrative rule *** issued pursuant to statutory authority, has the force and effect of law unless it is unreasonable or is in clear conflict with statutory enactment governing the same subject matter.” *Youngstown Sheet & Tube Co. v. Lindley* (1988), 38 Ohio St. 3d 232, 234, 527 N.E.2d 828, quoting *Kroger Grocery & Baking Co. v. Glander* (1948), 149 Ohio St. 120, 125, 77 N.E.2d 921. Further, “courts, when interpreting statutes, must give due deference to an administrative interpretation formulated by an agency which has accumulated substantial expertise, and to which the legislature has delegated the responsibility of implementing the legislative command.” *Maitland v. Ford Motor Co.*, 103 Ohio St.3d 463 , 2004-Ohio-5717 at ¶ 26 [citations omitted].

Representations made to a consumer in the course of a dealer’s effort to consummate a sale, after which something different is inserted into the written contract for the consumer’s signature, are not only admissible, **but form the very basis for a CSPA violation.** Any other interpretation would allow a written contract to operate as a waiver of the protections of the CSPA, contrary to the clear public policy of Ohio.

O.A.C. 109:4-3-16(B)(22) has long since passed muster. See *Clayton v. McCary* (N.D. Ohio 1976), 426 F. Supp. 248; *Renner v. Derin Acquisition Corp.* (1996), 111 Ohio App.3d 326, appeal denied (1996), 77 Ohio St.3d 1480, 673 N.E.2d 142 (citing *Gaylan v. Dave Towell Cadillac* (1984), 15 Ohio Misc.2d 1, 473 N.E.2d 64, 66)); *Peterman v. Waite* (Nov. 10, 1980), 5th Dist. 79-CA-19, 1980 WL 131229; *Wall v. Planet Ford, Inc.*, 2005-Ohio-1207; *Williams v. American Suzuki Motor Corp.*, 2008-Ohio-3123; *Casto v. Mathews Ford-Oregon* (Feb. 2, 1996), Lucas Mun. Ct. No. 94CVF00028, 1995 WL 911529; *Price v. Humphries* (Nov. 26, 1990), New Phil. Mun. Ct. No. 7-89-CVE-243, 1990 WL 677015. Along these same lines, the CSPA also protects consumers from unremitting sales tactics that interfere with a consumer's ability to read and understand the transactional documents. See, *Brown v. Silzar, Inc.*, 1981 WL 5321 (Ohio Ct. App. 2d Dist. Montgomery County 1981); *State ex rel. Cellebreeze v. Consumer's Edge, Inc.*, 1990 WL 677012 (Ohio C. P. 1980). Appellant's proposition of law would actually encourage such acts, which have been considered unlawful sales tactics for decades.

Ohio is not unique in disregarding the parol evidence rule in the arena of consumer protection litigation. See, e.g., *Downs v. Seaton* (Tex. App., 1993), 864 S.W.2d 553, 555; *Richards v. Luxury Imports of Palm Beach, Inc.*, 877 So.2d 944 (Fla. Dist. Ct. App. 2004); *Craig & Bishop v. Piles*, 2005 WL 3078860 (Ky. App. 2005), *aff'd*, 247 S.W.3d 897 (Ky. S.Ct. 2008); *Wang v. Massey Chevrolet* (2002), 97 Cal.App.4th 856, 869-70, 118 Cal.Rptr. 770. Perhaps most cogently, in *Torrance v. AS&L Motors, Ltd.* (1995), 119 N.C.App. 552, 459 S.E.2d 67, the court concluded:

Although defendant's oral statements concerning the condition of the automobile were parol evidence and inadmissible to contradict the terms of a written contract, **the evidence here was not offered to contradict the contract, but rather to prove an unfair or deceptive act.** The parol evidence rule does not bar the evidence in these situations.

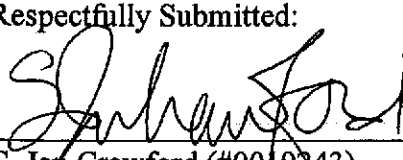
Id. at 554-55 [citations omitted and emphasis added]. The trial court in this case properly came to the very same conclusion and the Fifth District properly affirmed that decision. Under his CSPA claim, Appellee was not trying to enforce the oral promises of Appellant as a part of any written contract, but instead that Appellant's misrepresentations amounted to unfair and deceptive practices connected to a consumer transaction in violation of the CSPA.

It is uncontested that the underlying sale was a consumer transaction governed by the CSPA. Appellant does not even overtly dispute whether this transaction falls within the governance of O.A.C. 109:4-3-16(B)(22). Appellant cites no authority interpreting the CSPA that support its proposition of law. Yet Appellant and its Amicus rather extemporaneously argue for a return to the "good old days" when defenses based on standard contract law were consistently used to prevent hapless consumers from seeking meaningful relief in the courts -- one of the very reasons underlying the public policy which prompted enactment of the CSPA.

VI. CONCLUSION

Based upon the foregoing law and argument, it is clear that the Fifth District reached the right result in this matter. As a result, this Court should DECLINE to exercise jurisdiction in this matter.

Respectfully Submitted:



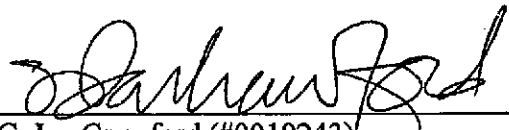
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VII. CERTIFICATE OF SERVICE

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