D115831669

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

ENTERED
SEP 27 2016

JEREMY WILLIAMS, Plaintiff	:	CASE NO. A1400300
	:	JUDGE MARK SCHWEIKERT (Retired sitting by Assignment)
v.	:	
SHARON WOODS COLLISION CENTER, INC., Defendant	:	DECISION ON PLAINTIFF'S MOTION FOR TREBLE DAMAGES, AND ATTORNEY FEES AND COSTS

This matter came before the Court following a jury trial wherein the jury returned a verdict for Plaintiff in the total amount of $8,079.78 and responded affirmatively to interrogatories that the Defendant had violated the Consumer Sales Practices Act ("CSPA") by committing certain acts in violation of Revised Code section 1345.01 *et seq,* and had violated the Motor Vehicle Repair Rule ("MVRR") by committing certain acts in violation of OAC 109:4-3-13 *et seq.* The Plaintiff has by motion requested the Court to grant the following:

1. To treble $4,894.76 of the Jury's $8,079.78 actual damages award against Defendant for violations of the CSPA for a total amount of $17,869.30 in actual and trebled damages; and
2. To award Plaintiff an additional $600 in statutory damages against Defendant for violation of the MVRR and the CSPA; and
3. To award reasonable attorney fees of $57,916.75 and reasonable litigation costs of $22,059.83, plus additional fees and costs incurred relating to the prosecution of the fee petition in the amount of $6,750.04 and an enhancement under the decision in *Bittner v. Tri-County Toyota, Inc.,* (1991) 58 Ohio St.3d 143; and
4. To enter final judgment against Defendant for violation of the CSPA and the MVRR.

Treble Damages

Plaintiff claims to be entitled to treble damages for three separate violations of the CSPA by Defendant as determined by the jury in interrogatories 5/5A, 6/6A, and 8/8A where there were economic awards of $3,302.25, $166.67, and $1,425.84 respectively. Revised Code section 1345.09 (B) provides for the consumer to opt for "three times the amount of the consumer's actual economic damages or two hundred dollars, whichever is greater" "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"

Impact of Marrone - Defendant argues that in accordance with *Marrone v. Phillip Morris USA, Inc.*, 110 Ohio St.3d 5, 2006-Ohio-2869, the alleged violation must be "substantially similar" to an act or practice previously declared to be deceptive by one of the methods identified in 1345.09 (B). The *Marrone* case and those citing it are all class action cases. This is important because, in Ohio, under R.C. section 1345.09 there is no provision to file a class action under the CSPA unless you meet the provisions of 1345.09 (B). To the contrary, a consumer may bring an "individual action" under R.C. 1345.09 (A). Section (B) serves to allow a consumer in an individual action to recover treble damages if the act or practice alleged meets the conditions outlined. Therefore under section (A) of R.C. section 1345.09, if the alleged act or practice is found to be one that is prohibited by R.C. section 1345.02, 1345.03, or 1345.031 it is a violation "*per se*" as the court instructed pursuant to OJI section CV 521.01 and consistent with the

Defendant's proposed jury instructions. Under section (B) of R.C. 1345.09, the consumer can recover treble damages if the "violation", so determined under section (A), falls within the classes of violations previously determined to be deceptive. Presumably, the increased damages are awarded because the Defendant was or should have been aware that its acts were "violations" of the law. The *Marrone* case discusses this in terms of "sufficient notice" to the supplier. This court is not aware of a case where the Marrone analysis is applied to a "individual action" by a consumer. However, the rationale is instructive. Accordingly, in considering the Plaintiff's claims for treble damages this court will consider if the Defendant could reasonably be expected to have sufficient notice that its acts were a violation of the law. In *Maronne* the court said, "Substantial similarity" means a similarity not in every detail, but in essential circumstances or conditions.

In order to proceed with its analysis the court must identify the operative facts, the essential circumstances or conditions, leading to the determination of the jury in each of the relevant interrogatories.

This case evolves from an auto accident on October 13, 2012 when Plaintiff's vehicle was involved in an auto accident and his 2010 Nissan Maxima was damaged in both the front and rear portions of the vehicle. The focus of the Plaintiff's claims is on the repairs that were made by the Defendant to the rear portions of the vehicle.

Plaintiff claims that the jury's determination in interrogatory number 5, that the Defendant failed "to perform repairs in a workmanlike manner" is a violation of the CSPA, R.C. 1345.02 (B)(2), and such has repeatedly been determined by courts of this state prior to the date of the acts in this case. In the memorandum accompanying his motion Plaintiff cites multiple cases recorded in the public inspection files (PIF) of the Ohio Attorney General, certified copies

of which were provided to the court by the Plaintiff. "Performing repairs in a workmanlike manner" is a standard that can be applied very broadly to any number of repair types. It would seem nonsensical for the law to require that a specific unworkmanlike repair be first litigated and recorded before treble damages would incur. Such a holding would deny each first claimant the benefit of treble damages and provide the poor performing supplier protection in the details of the conduct. For example, in this case the Plaintiff cites the following facts to support this claim:

- The evidence showed that repairs to the rear body panel were not performed in a workmanlike manner because: (1) they were not performed according to the manufacturer's specifications because structural bonding adhesive was used where not approved by the manufacturer, Nissan, (2) the welds were extremely poor, not in locations prescribed by Nissan, and the wrong types of welds, and (3) improper corrosion protection was applied.
- The evidence showed that repairs to the trunk floor were not performed in a workmanlike manner because: (1) sprayable seam sealer was used instead of brushable, pumpable seam sealer, and (3) the seam sealer was not refinished.
- The evidence showed that the repairs were all around sloppy work.
- The evidence showed that sloppy, shoddy, and improper repairs to the rear body panel made the vehicle unsafe to drive.

Should the supplier be able to escape treble damages for unworkmanlike repairs if no prior case has been based on poor welds, or inappropriate use of structural bonding adhesive, or improper application of corrosion protection? This court finds that such a level of similarity need not be found. The PIF decisions cited by Plaintiff, *Snider v. Conley's Service* PIF No. 1902; *State ex rel. Fisher v. Tanthorey* PIF file No. 1303; *State ex. Rel. Montgomery v. White dba Harvest Auto*

Body Shop PIF file no. 1666; provide sufficient notice to suppliers of consumer services in the state of Ohio that failure to provide consumer services in a workmanlike manner is a per se violation of the CSPA and subject to trebling of damages found by the trier of fact regardless of the specific conduct of the supplier.

Plaintiff claims that the jury's determination in interrogatory number 6, that the Defendant stalled and delayed and avoided or attempted to avoid a legal obligation is a violation of the CSPA, and such has repeatedly been determined by courts of this state prior to the date of the acts in this case. Plaintiff cites his own testimony at trial, that Mr. Burckard, the agent of Defendant, stalled and delayed in resolving the matter post repair and pre-suit, as the factual basis for this claim. Again stalling, delaying, and generally avoiding or attempting to avoid a legal obligation is a standard that can be applied very broadly to any number of consumer services. The PIF decisions cited by Plaintiff provide sufficient notice to suppliers of consumer services in the state of Ohio that where a supplier has legal obligations to consumers, and where there are no valid legal defenses for not performing those obligations, a supplier who avoids or attempts to avoid those obligations or stalls or delays performing those obligations commits a deceptive act and practice and a per se violation of the CSPA and is subject to trebleing of damages found by the trier of fact regardless of the specific conduct of the supplier or if the supplier is one of vehicle repair as the case herein, or household appliances, *State ex rel. Brown v. Lyons* PIF 10000304 ; or heating and air conditioning, *State ex rel. Brown v. Spears* PIF No. 10000403.

Plaintiff claims that the jury's determination in interrogatory number 8, that the Defendant repaired the Plaintiff's vehicle and returned it to the Plaintiff in an unsafe condition and such has repeatedly been determined by courts of this state prior to the date of the acts in this

case. In this case expert evidence showed the improper installation and repairs to the rear body panel rendered the vehicle unsafe to drive when it was returned to the Plaintiff. Plaintiff cites *Merrett v Gue* PIF No. 10002468 the court specifically found that "releasing the vehicle to the consumer, and knowingly allowing him to drive it in a condition which is dangerous to the consumer and to others on the road" is a violation of the CSPA.

Based on the above analysis the Plaintiff is entitled to treble damages based on the jury's determinations in interrogatories 5/5A ($3,302.25X 3 = $9,906.75), 6/6A ($166.67 X 3 = $350.01), and 8/8A ($1425.84 X 3 = $4277.52).

Attorney Fees

Plaintiff requests that this court award reasonable attorney fees in the amount of $57,916.75, and reasonable litigation costs in the amount of $22,059.83, plus additional fees and costs incurred relating to the prosecution of the fee petition in the amount of $6,750.04, and a full enhancement consistent with the factors listed in DR2-106(B) and the process outlined in *Bittner v. Tricounty Toyota, Inc.,* 58 Ohio St.3d 143(1991). Both the Plaintiff and Defense cite the *Bittner* case as the current law regarding attorney fee awards in CSPA cases such as this.

The total jury award in this case was $8,079.78. At first glance one might think that the Plaintiff's request of a total of $86,726.62 in fees and costs is an outrageous sum in relationship to the jury award. However, in the *Bitter* case, Chief Justice Moyer discarded that concern immediately stating, "At the outset, we reject the contention that the amount of attorney fees awarded pursuant to R.C. 1345.09(F) must bear a direct relationship to the dollar amount of the settlement, between the consumer and the supplier. The Act was amended in 1978 to include the payment of attorney fees '***to prevent unfair, deceptive, and unconscionable acts and practices, to provide strong and effective remedies, both public and private, to assure that consumers will

recover any damages caused by such acts and practices, and to eliminate any monetary incentives for suppliers to engage in such acts and practices.'" He also said, "Prohibiting private attorneys from recovering for the time they expend on a consumer protection case undermines both the purpose and deterrent effect of the Act" Rather, the *Bittner* court instructed that the proper process to determine an appropriate amount is to begin by determining the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. Then that amount should be adjusted "upward or downward" based on the degree of success of the prevailing party not synonymous with amount of recovery, deductions for any distinct unsuccessful claims where the fees should not be awarded, and then a possible adjustment by application of the factors listed in DR2-106(B).

Plaintiff's counsel has provided the court with an extensive itemized listing of the hours and expenses and hourly rates applied in her calculation of her fees and expenses. The court has reviewed these and lacking any challenges from the defendant, they appear reasonable.

The defendant does challenge the requested amount by insisting that the only claims for which fees can be awarded are for those claims where the jury found that the defendant acted knowingly. This challenge is based on the R.C. 1345.09 (F) which, as applied to this case, provides that attorney fees can only be awarded if, "the supplier has knowingly committed an act or practice that violates this chapter." Defendant correctly argues that the *Bittner* court instructs this court to make such an adjustment and that the Plaintiff's counsel has provided no itemization of her fees that would make such an adjustment in an objective manner. The distinction made in the statute is the characterization of the offensive act being committed knowingly. Based on this the court instructed the jury on the relevant definition of knowingly and in interrogatory 19 inquired of the jury which wrongful acts it found to be committed

knowing. The jury responded to that interrogatory citing only the claims "Failed to provide the consumer with written itemized list of repair with identity of the individual; Failed to tender replaced parts." Additionally the jury found for the Defendant on the Fraud claim. Accordingly, the Defendant argues that the Plaintiff should only recover attorney fees and expenses for the claimed violations that the jury found were committed knowingly and not for fees and expenses associated with the fraud claim nor for those other claims where the plaintiff prevailed but the jury did not identify as knowingly committed by the Defendant.

Plaintiff argues that the facts supporting the various claims in this case are entwined and stem from a common core of facts and related legal theories and cites numerous cases where the court did not separate fees and expenses according to a knowingly finding. Also that the plain reading of the CSPA law at R.C. 1345.09(F) would allow fees and expenses if the supplier has knowingly committed a violation, interpreting the law as to not require a sorting or fees and expenses.

This court finds that the claims in this case do stem from a common core of facts and related legal theories and that the Plaintiff has overwhelmingly prevailed on his claims with the jury finding the following violations of the CSPA:

1. That the Defendant did represent that the repair had sponsorship, approval, performance characteristics, accessories, uses, or benefits that it did not have;
2. That the Defendant did represent that the repair was of a particular standard or quality that it was not;
3. That the Defendant did represent that the repair had been performed in accordance with a previous representation, when it had not;

4. That the Defendant did represent that it had a sponsorship, approval, or affiliation that it did not have;
5. That the Defendant did fail to perform repairs in a workmanlike manner.
6. That the Defendant did stall and delay and avoided or attempted to avoid a legal obligation;
7. That the Defendant did charge for labor based upon an estimate of time instead of the actual time taken to perform the repair;
8. That the Defendant did repair the vehicle and return it to the Plaintiff in an unsafe condition;
9. That the Defendant did, in connection with the repair, represent that the repairs were performed when such was not the fact;
10. That the Defendant did , in connection with the repair, fail to provide the Plaintiff with a written itemized list of repairs performed which identified the individual performing the repair or service;
11. That the Defendant did, in connection with the repair, fail to tender to the Plaintiff any replaced parts.

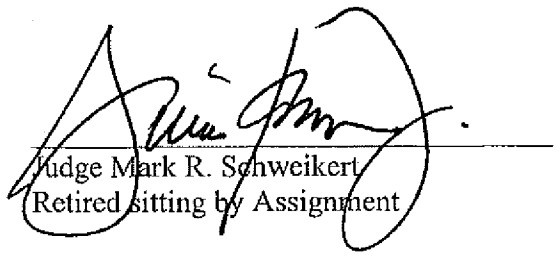
Considering the process outlined in the *Bittner* case this court finds that the Plaintiff's counsel was highly successful in her pursuit of these claims on behalf of the Plaintiff. The court finds that the prosecution of this case did involve some complex and detailed factual issues as illustrated by the various experts who testified and the Plaintiff's success was influenced by counsel's ability to focus the jury on those detailed facts favoring the Plaintiff's claims. Nonetheless, this court is not inclined to adjust the award of attorney fees and expenses pursuant to the factors in

DR 2-106(B) beyond those claimed by Plaintiff's counsel, finding the attorney fees and expenses claimed to be adequate to fully compensate counsel for service rendered herein.

Accordingly, Plaintiff is entitled to judgment against the Defendant in the following amount:

1. Interrogatory 1/1A	$ 475.28
2. Interrogatory 2/2A	$ 2,376.41
3. Interrogatory 4/4A	$ 250.00
4. Interrogatory 5/5A	$ 9,906.75
5. Interrogatory 6/6A	$ 350.01
6. Interrogatory 8/8A	$ 4,277.52
7. Interrogatory 10/10B (See items 10 & 11 Below) The Jury granted an award of $83.33 for other deceptive acts that are the same violations as found in Interrogatories 15 &16. The Plaintiff has elected the statutory amounts over the award.	
8. Interrogatory 13 (Non-economic Damages)	$ 500.00
9. Interrogatory 14 Statutory Amount	$ 200.00
10. Interrogatory 15 Statutory Amount	$ 200.00
11. Interrogatory 16 Statutory Amount	$ 200.00
12. Reasonable Attorney Fees in litigation	$57,916.75
13. Reasonable litigation costs	$22,059.83
14. Reasonable fees and costs regarding fee petition	$ 6,750.04
Total	$105,462.59
Plus court costs and interest	

Pursuant to local rule 17, counsel for Plaintiff shall prepare a journal entry consistent with this decision and present it to the Court accordingly.



Judge Mark R. Schweikert
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Appendix 3

D116011370

ENTERED
OCT 17 2016

IN HAMILTON COUNTY COMMON PLEAS COURT, OHIO

JEREMY WILLIAMS

PLAINTIFF

- VS -

SHARON WOODS COLLISION CENTER, INC.

DEFENDANT

CASE NO. A 1400300

JUDGE MARK SCHWEIKERT
(Retired sitting by Assignment)

FINAL JUDGMENT ENTRY

This matter having been tried to a jury and a verdict returned, and all claims and post trial motions having now been ruled upon, judgment is hereby rendered as follows:

1. Plaintiff Jeremy Williams is granted judgment against Defendant Sharon Woods Collision Center, Inc. in the total amount of $105,462.59, inclusive of $18,735.97 in actual, treble, statutory, and noneconomic damages, and $86,726.62 in attorney fees and litigation costs, plus court costs and interest from the date of judgment at the rate of 3% per annum.

All aspects of this case now being concluded, the Court finds that there is no just cause for delay and this is a Final Judgment Entry.

COURT OF COMMON PLEAS
ENTER

HON. JUDGE MARK SCHWEIKERT

THE CLERK SHALL SERVE NOTICE TO PARTIES PURSUANT TO CIVIL RULE 58 WHICH SHALL BE TAXED AS COSTS HEREIN.

FOR COURT USE ONLY

S.C. Line # : 5

See and approved by:

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