IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT
HAMILTON COUNTY, OHIO

JEREMY WILLIAMS	:	Appeal No. C1700511
Plaintiff-Appellee	:	Trial No. A1400300
vs.	:	
SHARON WOODS COLLISION CENTER, INC.	:	
Defendant-Appellant	:	

BRIEF OF APPELLANT, SHARON WOODS COLLISION CENTER, INC.

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I. Tale of Contents and Assignments of Error

II. STATEMENT OF THE CASE

Plaintiff-Appellee, Jeremy Williams, (hereinafter JW) sued Defendant-Appellant, Sharon Woods Collision Center, (hereinafter SWCC) asserting multiple causes of action; including claims for violations of the Consumer Sales Practices Act, the Motor Vehicle Repair Rule, and for fraud and deceit arising from the repair of his vehicle in November 2012.

A. Statement of Jurisdiction

This appeal was timely filed on September 20, 2017, from the trial court's decision denying new trial entered August 22, 2017. The trial court's entry denying the motion for new trial makes the original Entry of Judgment a final appealable order.

B. Procedural Posture

The Plaintiff-Appellee, JW, filed a Complaint for damages alleging repairs to his vehicle were performed in an unworkmanlike manner, resulting in diminution in value, violations of the Consumer Sales Practices Act, the Motor Vehicle Repair Rule, and fraud and deceit. Td. 2.

The matter proceeded to trial before a visiting judge and jury on May 31, 2016 through June 7, 2016, the jury rendered its' verdict, including answering 21 special interrogatories, awarding damages for violations of the Consumer Sales Practices Act and Motor Vehicle Repair Rule; but returning a verdict in favor of the Defendant-Appellant, on the claim for fraud. Td. 51-91.

Plaintiff-Appellee, JW, filed a Motion for Statutory Damages, Treble Damages, Attorney Fees, and Cost as allowed by the CSPA. T.d. 92. The matter was heard before the Court on July 21, 2016, with the court Entry requesting the hearing transcript. T.d. 95.

The Court requested supplemental briefing and entered its' decision on the Motion for Statutory and Treble Damages, Attorney Fees and Cost September 27, 2016. T.d. 99. The final Judgment Entry was entered October 17, 2016. T.d. 10. Appellant, SWCC, timely filed a Motion for New Trial November 14, 2016. T.d. 104, which was denied by the assigned judge but not served by the clerk. T.d. 107. The assigned judge placed of record an Entry of Recusal. T.d. 110. The case was reassigned T.d. 111, and the newly appointed judge noted the prior entry had not been served as required, an Entry Denying Motion for New Trial was entered on August 22, 2017 T.d. 112. with notice from the clerk from which a Notice of Appeal was filed on September 20, 2017. T.d. 114.

C. Statement of Facts

JW, is the owner of a 2010 Nissan Maxima which was involved in a motor vehicle collision on October 13, 2012, T.p. pg.118, and contracted with Defendant-Appellant, SWCC, to repair the damages to his vehicle, dropping the vehicle off on October 22, 2012, T.p. 134, Ex. 9; T.p. 734, Ex. 17, repairs were completed on November 14, 2012. T.p. 738.

JW performed internet research and learned of the concept of diminished value, T.p. 139-140, attributable to the fact a vehicle that had been involved in a collision requiring repairs and despite repairs such vehicle would have diminished value in the eyes of the public.

JW through his research identified an entity, WreckCheck, operated by David Williams, to whom he took his vehicle for inspection and based upon such inspection

believed repairs had not been performed in accordance with the manufacturer's specifications, T.p. 152, believing his vehicle had been repaired not only with welds but with the use of structural bond adhesives which was not in conformity with Nissan repair specifications and as a consequence the vehicle was unsafe to drive, expressing his belief the cost of repair would exceed the value of his vehicle. T.p. pg.154.

JW testified he had no opinion as to the value of his vehicle either pre-loss or post loss, T.p. pg.186, 187, and he would defer to David Williams for determination of both pre-loss and post-loss pre-repair valuation. T.p. 217. JW did not obtain an estimate to determine the cost to correct such repairs. T.p. pg.188. JW expressed no other complaints to SWCC regarding deficient repairs to the vehicle. T.p. 143; with the exception of a paint blemish corrected the day he picked up the vehicle. Tp. 200.

David Williams inspected the vehicle at the request of JW, at his business in Wheelersburg, Ohio on December 18, 2012. T.p. 144.

Additional expert testimony was elicited from Mike Anderson and Larry Montanez, each of who testified the vehicle was not repaired in accordance with Nissan's specifications, repairs were performed in an unworkmanlike manner, as well as numerous other aesthetic deficiencies attributable to the repairs performed by SWCC.

SWCC presented testimony from Bernie Burckard, President and sole shareholder of SWCC and experts, David Damon and Geoffrey Overley, who inspected the vehicle and testified the vehicle was repaired in a workmanlike manner and the utilization of an adhesive bond, although, not specified by Nissan, was not specifically prohibited and that adhesives were used in the industry for corrosion protection, in addition to their adhesive quality and had no effect upon the integrity of the repair.

III. Assignments of Error and Argument

FIRST ASSIGNMENT OF ERROR

The Trial Court erred in admitting testimony as to diminution in value, permitting such issue to be considered by the jury.

First Issue Presented for Review and Argument

Diminution in value requires evidence of pre-loss market value, post-loss market value, as well as cost of repair.

The Appellee, JW, pled as a theory of recovery diminution in value, Complaint, T.d. 2, and offered testimony from David Williams, as an expert, utilizing a program known as WreckCheck as the methodology for determining such loss. SWCC timely objected to the testimony of David Williams, SWCC timely moved his testimony be stricken, T.p. 522, and renewed the objection upon moving for a Directed Verdict on the claim for diminution in value, T.p. 553-561, as neither JW, David Williams, nor any other witness offered by Plaintiff expressed an opinion as to the vehicle's value post-loss pre-repair; a value necessary for a determination of the extent of damages for damage to a motor vehicle and necessary to compute damage for diminution in value.

The rule for the determination of the measure of damage to a motor vehicle is expressed in *Falter v. Toledo*, (1959) 169 Ohio St. 238, 158 N.E. 2d 893, as the difference in the market value immediately before and after the loss. An alternative measure of damages for property damage to a motor vehicle is the cost of repair, if the cost of repair does not exceed the amount of damages to be arrived at using the rule from *Falter*. SEE, *Allstate Ins. Co. v. Reep*, 7 Ohio App.3d 90, 454 N.E. 2d 580 (10th Dist. 1982).

The Tenth District Court of Appeals addressed a claim for diminution in value in *Rokich v. Anthem Blue Cross & Blue Shield*, 172 Ohio App.3d, 523, 2007-Ohio-3739, 875 N.E.

2d 993 (10th Dist.) The court in *Rakich, id.*, described diminution in value as inherent diminished value, i.e., the loss attributable to the fact a vehicle has been involved in a collision and recognizes the principle of two vehicles of the same year, model, with similar options and mileage should have a similar market value but that both in reality and public perception a consumer is going to pay less for a vehicle that has been involved in a collision than one that has not.

The general rule of damage is to make the party whole, the court in *Rakich, id.*, recognized the injured party was not seeking an additional award of the difference between the market value of the vehicle immediately before and after the collision but noted the cost of repairs does not always fully compensate for the collision loss, noting a vehicle involved in a collision irrespective of the repairs has a value less than its pre-accident market value.

The gross diminution in value measure of damage expressed in *Falter*, the method of calculating damages to a motor vehicle is the value immediately before the accident and immediately after and prior to repairs; the residual diminution in value does not overlap the cost of repairs because it is calculated based on the comparison of the value before the accident and after the repairs are made but cannot exceed the difference between the pre and post loss pre-repair value; i.e., the gross diminution in value.

An illustration of how such would be applied, assume the following:

- Pre-accident value $25,000.00
- Post-accident value pre-repair $10,000.00
- Gross diminution in value $15,000.00
- Cost of repair $11,000.00
- Residual diminution in value $4,000.00

The residual diminution in value can never be greater than the difference between market value immediately before and after the claim, less the cost of repair.

In the absence of testimony as to the value of the vehicle post loss and pre repair, it was error for the trial court to admit the testimony of David Williams or any testimony as it relates to diminution in value, as such could not be determined consistent with the measure of damage expressed in *Falter* and *Rokich* for determination of such loss.

Second Issue Presented for Review and Argument

> Where there has been no evidence as to post loss value, pre-repair, a litigant cannot fulfill its' burden to prove diminution in value.

SWCC at the close of Appellee's evidence moved for a directed verdict, T.p. 553-564 on the issue of diminution of value-that as a matter of law Appellee had not sustained its' burden to produce evidence in order to do the calculations necessary to determine diminished value, specifically, no witness had offered testimony as to the vehicle's post loss value prior to repair as required by *Falter v. Toledo* (1959) 169 Ohio St. 238, 158 N.E. 2d 893.

An appellate court applies a de novo standard of review, on a motion for directed verdict as it presents a question of law. In *Good Year Tire & Rubber Co. v. Aetna Cas. & Asur. Co.*, 95 Ohio St.3d 512, 2012-Ohio-2842, 769 N.E.2d 835 at ¶4 the Supreme Court noted:

> " 'A motion for a directed verdict***does not present factual issues but a question of law, even though in deciding such a motion, it is necessary to review and consider the evidence.' *O'Day v. Webb* (1972), 29 Ohio St.2d 215, 280 N.E.2d 96 ¶3 of the syllabus.' ..."

The witnesses offered by Plaintiff/Appellee only expressed opinions as to the vehicle's value post repair. Specifically, each of the witnesses offered by Appellee (himself

and three experts) indicated they had no opinion as to the vehicle's value post loss and pre-repair.

Jeremy Williams testified "....repair cost would exceed the value of my vehicle." T.p. 154, line 17 but did not obtain or seek an estimate to correct any claimed deficient repairs T.p. 188, and further testifying in his opinion the vehicle "....is essentially worthless, the cost of repairs are going to be more extensive than the vehicle is worth today." T.p. 216.

Mike Anderson testified in his opinion the car was worthless T.p. 44; Larry Montanez testified diminished value is junk science, having published an article on such and proceeded to explain why that was his opinion, including it was a nebulous loss that dissipates the longer you own the vehicle. T.p. 50; David Williams testified he had made no determination of the vehicle's pre-loss and post loss values pre-repair, T.p. 501.

The Appellee failed to offer evidence as to the post loss pre-repair value, thus, a determination of residual diminution in value could not be calculated.

JW specifically deferred to the opinion of David Williams, of WreckChecks, his expert on diminished value, who testified as to pre-accident value based upon an NADA evaluation, T.p. 467, but had not determined post loss pre-repair value, T.p. pg. 469, but testified the vehicle had a total diminished value of $17,415.00, T.p. 179-473, 30% would be attributable to the inherent diminished value, the remaining residual diminished value attributed to what he described as faulty or unworkmanlike repair, T.p. pg. 496, 501; but acknowledged he made no determination of fair market value post loss and pre-repair. T.p. 501.

SECOND ASSIGNMENT OF ERROR

> The Trial Court erred in awarding attorney fees and expenses for the services and costs requested.

Issue Presented for Review and Argument

Attorney fees for violations of the CSPA are limited to those violations committed "knowingly".

The Complaint filed January 17, 2014 set forth multiple causes of action for recovery under the Consumer Sales Practices Act, specifically, paragraphs 2, 3, 4, 5, 11, 17, 21, 26, and 27. T.d. 2. The allegations as set forth in paragraphs 26 and 27 represent the only activities of SWCC found to have been committed "knowingly"; the failure to provide an itemized list of repairs performed, which identified the person performing the repair or service and the failure to tender to Mr. Williams the replaced parts.

Special Interrogatories were presented to the jury for each of the various claims of damage asserted by Appellee. The jury in response to special interrogatory 10A, T.d. 68, specifically found SWCC committed other deceptive acts and described such acts as the failure to provide JW with an itemized list of repairs which identified the individual who performed the repair and SWCC failed to tender replaced parts, awarding damages in the amount of $83.33, Special Interrogatories 10A, 10B, T.d. 69, 70.

The Jury furthered answered interrogatories directed to claimed violations of the Motor Vehicle Repair Rule/MVRR in Special Interrogatory 15, T.d. 76, that SWCC failed to provide a written list of repairs performed which identified the individual performing the repair service; Special Interrogatory 16, T.d. 77, that SWCC failed to tender replaced parts, but awarded no damages. T.d. 79.

The jury was asked in Special Interrogatory 19, T.d. 81, whether any interrogatory answered affirmatively in Interrogatories 1 through 11 and 14, 15, or 16 was done "knowingly"; the jury answered (yes), identifying two acts committed "knowingly" the

failure to provide the consumer with a written list of repairs with the identity of the person performing the repair, and the failure to tender replacement parts; Special Interrogatory 19,T.d. 82, asked the jury to assess the damages attributable to the acts the committed "knowingly" for which no damages were awarded.

The Court instructed the jury specifically on what constituted "knowingly" consistent with Ohio Jury Instructions, instructing the jury consistent with 1 OJI CV 521.11.

The comments to the Instruction indicate the definition of "knowingly" only applies to a determination of whether a Plaintiff is entitled to attorney fees under R.C. 1345.09, SEE, *Einhorn v. Ford Motor Co., (1990), 48 Ohio St.3d 27,* 548 N.E.2d 933.

The RC/CSPA §1345.09, (F) (2) allows at the trial court's discretion to award reasonable attorney fees if "[t]he supplier had knowingly committed an act or practice that violates this chapter", further defining knowledge as "....actual awareness, but such awareness may inferred where objective manifestations indicate that the individual involved acted with such awareness." R.C. 1345.01 (E). The Court noting that the legislative purpose of the act is best served by finding that "knowingly" committing an act in violation of R.C. 1345 means the supplier need only intentionally do the act that violates the CSPA.

The Supreme Court subsequently in *Bittner v. Tri-County Toyota, Inc.*, (1991) 58 Ohio St.3d 143, 569 N.E.2d 464, stated:

> Where, as here, the claims can be separated to a claim for which fees are recoverable and a claim for which no fees are recoverable. The trial court must award fees only for the amount of time spent pursuing a claim for which fees may be awarded". *Bittner,* i.d. at 145

SEE, *Hensley v. Ekerhart,* (1983) 461 U.S. 424, 433, 103 Supreme Court 1933, 1939.

In *Kinder v. Smith*, 2013-Ohio-2157, 12th App. Dist. found the trial court did not abuse its' discretion when it limited the attorney's fees award to the work performed for the approved specific consumer law violations and not other causes of action. The court noted at ¶12 when awarding reasonable attorney fees pursuant to R.C. 1345.09 (F) (2) the trial court should first calculate the number of hours reasonably expended in the case multiplied by a reasonable hourly fee. The court at ¶13 noted in the initial calculation the trial court should exclude any hours that were unreasonably expended....that where the claims can be separated from which fees are recoverable and claim for which no fees are recoverable, the trial court must award fees only for the amount of time spent pursuant to the claim for which fees may be awarded, consistent with the court's finding in *Bittner, infra*. In this case, the evidence presented at the attorney fee hearing and by Appellee's counsel, made no attempt to separate how much time was spent litigating any particular cause of action.

The CSPA claims found to have been committed "knowingly" did not present novel legal issues, did not require specialized professional skills to litigate, did not prevent counsel from accepting other cases and would not encumber counsel with burdens of time limitations. Specifically, the two-act committed "knowingly" were the failure to tender replacement parts and the lack of identification of the technician in the final billing from SWCC in Ex. 13, did not identify the tech, required minimal testimony and no expertise; Bernie Burckard of SWCC acknowledged the tech was not identified. T.p. 426, 427; Jeremy Williams, T.p. 158, lines 3-11; as to failure to identify the tech; as to replacement parts, Jeremy Williams indicated there was no discussion between himself and Mr. Burckard of

SWCC, T.p. 157, lines 13-25, pg. 158, lines 1-2; but which Mr. Burckard denied in his direct testimony.

In addition, Appellee's Complaint at ¶27 asserted SWCC failed to tender him replacement parts. Td. 2. JW completed a form authorizing SWCC to perform services, Defendant's Ex. A, which included an item to be marked by him as to whether he wished parts returned or discarded which was left blank. Appellee having pled both facts in his Complaint clearly knew of the violations of the MVRR pre-suit and sparse testimony was offered concerning each. It was Appellee's duty to separate the time devoted to establishing and proving such violations and in the absence of any attempt to do so renders the award of attorney fees by the trial court an abuse of discretion.

Appellee's counsel made no attempt to establish the amount of fees incurred in pursuing the claims found committed "knowingly". Appellee failure to separate such time and thus did not sustain its' burden and the trial court abused its' discretion in awarding attorney fees for all services performed.

The transcript of proceedings clearly establishes neither of the acts found to have been committed "knowingly" required expert testimony.

THIRD ASSIGNMENT OF ERROR

The Trial Court erroneously denied Appellant's Motion for New Trial.

Issue Presented for Review and Argument

> It was error for the trial court to deny the Motion for New Trial and such presented questions of fact, which went to the heart of Appellee's claim, i.e., that his vehicle was worthless, i.e., the cost of repair exceeded its' value.

The Motion for New Trial was premised on the fact that ten days post trial JW sold the vehicle, which he and his three expert witnesses testified in their opinion the vehicle

was, a total loss, was unsafe to drive, and the cost to repair exceeded the fair market value. JW, T.p. 154, 188, 216; Mike Anderson, T.p. 44; and David Williams, T.p. 7.

Appellee had a duty to mitigate his claimed damages as his claim for failure to perform in an unworkmanlike manner and other theories upon which his claim was based were in essence a claim for breach of contract, i.e., SWCC had not performed repairs for which it was contracted to perform. Under the mitigation of damage doctrine, the party that makes a claim on a contract cannot receive damages that it could have prevented by reasonable affirmative action. SEE, *Four Seasons Environmental, Inc. v. Westfield Cos.*, 93 Ohio App.3d 157, 638 N.E.2d 91 (1st Dist. Ham. Co. 1994), and which it could have prevented by reasonable action, without substantial risk to such party. SEE, *Czarneki v. Basta*, 112 Ohio App.3d 418, 679 N.E.2d 10 (8th Dist. Cuyahoga Co., 1996).

The Supreme Court noted a party who has been wronged by a breach of contract may not unreasonably sit idly by and allow damages to accumulate but instead must attempt to minimize his damage. SEE, *State, ex.rel Stacy v. Batavia Local School District Bd. of Ed.*, 105 Ohio St.3d 476, 2005-Ohio-2974, 892 N.E.2d 298.

As this Court noted in *Chandler v. General Motors. Accept. Corp.*, 68 Ohio App.2d 30, 426 N.E.2d 521 (1st Dist. Ham. Co., 1980) the damages a Plaintiff could have avoided with reasonable effort, without undue risk or expense, cannot be charged against Defendant.

SWCC moved for a new trial, T.d. 104, asserting grounds pursuant to Civil Rule 59 (A) (2) (8) & (9), i.e.:

(A) (2) Misconduct of the prevailing party;

(8) Newly discovered evidence of material for the party applying, which with reasonable diligence could not have been discovered or produced at trial;

(9) Error of law occurring at trial, brought to the attention of the trial court;

The Motion for New Trial was supported by the Affidavits of David Damon, T.d. 103, and Geoffrey Overley, T.d. 102 each of whom had testified as experts for Appellant.

The Motion noted the premise of JW claims were the vehicle had been repaired in an unworkmanlike manner, for failure to follow the specifications set forth by Nissan Motor Co., and as a consequence sustained not only a diminution in value but was now unsafe to drive, rendering the vehicle worthless.

Appellee's experts; Larry Montanez, Mike Anderson, and David Williams each testified the vehicle had not been repaired to Nissan's specifications and as repaired was unsafe to drive, resulting not only in diminution in value but the vehicle only retained salvage value (an amount not presented as part of Appellee's case), each testified the vehicle was unsafe to operate and the cost to restore the vehicle to its pre-accident condition exceeded its' present value.

It is recognized the standard of review on a Motion for New Trial is abuse of discretion which consists of more than an error of judgment; and connotes an attitude on the part of the trial court that is unreasonable, unconscionable, or arbitrary. SEE, *Rock v. Cabral*, (1993) 67 Ohio St.3d 108, 616 N.E.2d 218.

In the application of the abuse of discretion standard of review, this Court does not substitute its' judgment for that of the trial court but it is respectfully submitted it must examine the facts for it to determine whether the trial court abused its discretion in the denial of the Motion for New Trial. It is respectfully submitted as the matter was tried to a visiting judge, the Motion to Deny New Trial was made by the assigned judge, who assumed the bench the week this matter was set for trial and was not involved in any pre-trial

proceedings and who thereafter recused from hearing matters in respect to this case, T.d. 110. Because of the nature of the allegations in the Motion for New Trial, that Appellee testified and offered testimony from other experts his vehicle had no market value and thus should have only salvage value, sold such vehicle less than two weeks after conclusion of trial, raises issues that justified a hearing to further allow such issues to be developed and presented with full explanation as to what was known.

It is respectfully submitted that the procedure followed by the trial court's ruling on the Motion for New Trial was a denial of due process, which would be an abuse of discretion to overrule SWCC's Motion for New Trial. The standard of review for constitutional analysis, i.e., denial of due process, requires application of mixed question standard of review, accepting facts as found by the trial court, if supported by competent credible evidence but this Court can independently form its' own legal conclusion when applying the facts. Procedural due process is a fluid concept, SEE, *Ohio v. Hochhausler,* (1996) 76 Ohio St.3d. 455, 459, 688 N.E.2d 457, 463, citing *Walters v. Natl. Assn. of Radiation Survivors,* (1985) 473 U.S. 305, 320, 105 S. Ct. 3180, 3188-3189. The affidavits of both Overley and Damon, T.d. 102 and 103, earlier established no repairs had been made to the Williams vehicle, excepting application of seam sealer at the site where Appellee's expert Larry Montanez had broken a weld with a hammer and chisel.

Civil Rule 59 does not mandate a hearing but at a minimum it requires elemental fairness to address the issues raised and the matter should have either been presented to the visiting judge before whom the matter was tried or at a minimum, a hearing conducted to determine the factual predicates asserted in support of the Motion for New Trial.

IV. CONCLUSION

Sharon Woods Collision Center respectfully requests this Court find the trial court committed error in the admission of the testimony as to diminution of value from David Williams, as neither he nor any other witness identified a post loss, pre-repair value and without such, a calculation as to diminution in value cannot be made consistent with the mandates of the measure of damages for damage to a motor vehicle in *Falter v. Toledo,* (1959) 169 Ohio St. 238, 158 N.E.2d 893 and the determination of diminution of value outlined in *Rakich v. Anthem Blue Cross & Blue Shield,* 172 Ohio App.3d, 523, 2007-Ohio-3739 , 875 N.E.2d 993 (10th Dist.).

SWCC requests that the Court vacate the finding of attorney fees as counsel for Appellee made no attempt to distinguish those activities or efforts directed towards the determination of the violations of the CSPA/MVRR committed "knowingly" from other causes of action set forth and attorney fees are limited by R.C. 1345.09 to acts committed "knowingly".

It is further respectfully submitted, the trial court's decision denying the motion of SWCC for a new trial be vacated, as JW testified and submitted the testimony of three experts his vehicle was a total loss and incapable of repair, but proceeded to sell such one-week post-trial. Such sale being inconsistent with the legal theories advanced at trial sufficient to warrant a new trial in this matter.

It is respectfully submitted that the decision of the trial court be vacated, and this matter remanded to the trial court for further proceedings consistent with the directives of this Court.

Respectfully submitted,

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Attorney for Plaintiff-Appellant,
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V. CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Appellant, Sharon Woods Collision Center, Inc., was sent by regular U.S. Mail to Elizabeth Ahern Wells at 8250 Washington Village Drive, Dayton, Ohio 45458 this 12th day of January, 2018.

s/Dennis A. Becker
Dennis A. Becker (#0005511)
Attorney for Plaintiff-Appellant
Sharon Woods Collision Center, Inc.

APPENDIX

D11920897I

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

JEREMY WILLIAMS,	:	Case No. A1400300
	:	
Plaintiff,	:	Judge Tom Heekin
	:	
v.	:	
	:	
SHARON WOODS COLLISION CENTER, INC.,	:	ENTRY DENYING MOTION FOR NEW TRIAL
	:	NUNC PRO TUNC 12/21/16
Defendant.	:	

ENTERED
AUG 22 2017

This matter came before the Court on Sharon Woods Collision Center, Inc. ("Defendant's") "Motion for New Trial." Jeremy Williams ("Plaintiff") opposes Defendant's Motion. After reviewing the memoranda, the Court finds the Motion not to be well taken.

Accordingly, IT IS THE ORDER OF THE COURT that Defendant's Motion is hereby DENIED.

Be it so Ordered.

Date: 12-21-16

JUDGE TOM HEEKIN

COURT OF COMMON PLEAS
ENTER
HON. COURT S. HARTMAN
THE CLERK SHALL SERVE NOTICE TO PARTIES PURSUANT TO CIVIL RULE 58 WHICH SHALL BE TAXED AS COSTS HEREIN.

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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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.

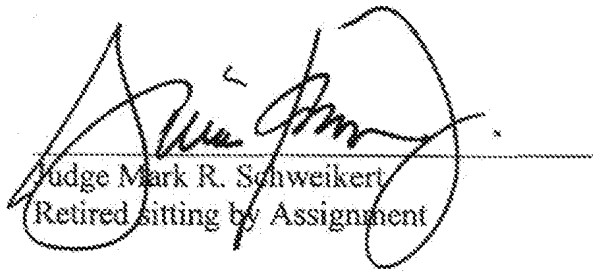
Considering the process outlined in the *Bittner* case this court finds that the Plaintiff's counsel was highly successful in her pursuit of these claims on behalf of the Plaintiff. The court finds that the prosecution of this case did involve some complex and detailed factual issues as illustrated by 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
Retired sitting by Assignment

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