[Cite as *Green Maple Ents., L.L.C. v. Forrester*, 2021-Ohio-4640.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
JEFFERSON COUNTY

GREEN MAPLE ENTERPRISES, LLC D/B/A
SERVPRO OF WEST HILLS & NORTH WASHINGTON COUNTY,

Plaintiff-Appellant/
Cross-Appellee,

v.

CLAY FORRESTER ET AL.,

Defendants-Appellees/
Cross Appellants.

OPINION AND JUDGMENT ENTRY
Case No. 20 JE 0020

Civil Appeal from the
Court of Common Pleas of Jefferson County, Ohio
Case No. 18-CV-535

BEFORE:
Gene Donofrio, Carol Ann Robb, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed

Atty. Stephen Eckinger, 1611 North Main Street, Suite A, North Canton, Ohio 44720, for Plaintiff-Appellant/Cross-Appellee and

Atty. Costa Mastros, 401 Market Street, Suite 1210, Steubenville, Ohio 43952, for Defendants-Appellees/Cross-Appellants.

Dated:
December 30, 2021

Donofrio, J.

{¶1} Plaintiff-appellant/cross-appellee, Green Maple Enterprises, doing business as Servpro of West Hills & North Washington County, (Servpro) appeals from a Jefferson County Common Pleas Court judgment granting a verdict in favor of defendants-appellees/cross-appellants, Clay Forrester and Emily Nelson (Homeowners), in the amount of $48,061.22 plus costs and interest. Homeowners have cross-appealed.

{¶2} In November 2017, Homeowners purchased a home and a fire occurred there three days later. Their insurance company placed them in touch with Servpro. Green Maple Enterprises, doing business as Servpro, is a restoration company that has been in business for over 6 years. Servpro responds to emergency cleanup situations and performs rebuilding/remodeling. Servpro completed the mitigation work to the house.

{¶3} On December 12, 2017, Homeowners contracted for Servpro to complete the rebuilding/remodeling of the home. The preliminary estimate was $91,287.06 for partial roof replacement, fireplace work around the area where the fire began (source room), and interior ceiling work. Servpro contends that its representative told Homeowners that the process would take between 8-12 months. Homeowners contend that they were told that the process would be completed by late January/early February 2018. Homeowners returned home in late June 2018 after the insurance company would no longer pay for them to stay outside of the home. When they returned home, construction was ongoing. Final walkthrough occurred in August 2018 and Homeowners presented a punch list of unfinished items. Homeowners did not want Servpro to complete the punch list.

{¶4} Servpro received payments for its work directly from Homeowners' insurance and mortgage companies. From one of these payments, Servpro wrote a check to Homeowners for $16,087.50 so that they could have another company perform

chimney repairs. According to Servpro, it was paid $75,199.56 for the project and was still owed $27,685.06. Servpro invoiced Homeowners stating the balance due, which included a $355.46 deduction for their punch list items.

{¶5} When it did not receive a final payment, Servpro filed a complaint against Homeowners in the Jefferson County Common Pleas Court for breach of contract, unjust enrichment, payment due on account, and fraud. Homeowners answered and counterclaimed, asserting that Servpro failed to complete its work, performed in an unworkmanlike/negligent manner, breached its contract, and violated the Ohio Consumer Sales Practice Act (OCSPA), R.C. 1345, et. seq.

{¶6} A bench trial was held and on September 23, 2020, the trial court found in favor of Homeowners. The court noted that it had viewed the home, and although this was not evidence, it provided an understanding of the trial testimony concerning the defects alleged. The court concluded that no evidence supported Servpro's causes of action against Homeowners because Servpro breached the contract by failing to perform in a timely and unworkmanlike manner.

{¶7} The court also held that Servpro committed deceptive and unconscionable acts in violation of the OCSPA. It found that Servpro acted deceptively when it attempted to substitute plain pine wood for cedar on the ceiling in the source room. The court explained that the contract provided for Servpro to install cedar on that ceiling, and while ultimately installed there, this occurred only because Homeowners happened to be on site and reminded Servpro that the ceiling was supposed to be cedar. The court also found that while Servpro's installation of rubber quarter rounds for crown molding was "understandable" because the area where the molding was supposed to go was round, it was unacceptable as crown molding was provided for in the contract.

{¶8} The court further held that Servpro's lengthy delays and poor workmanship were "unconscionable" acts under the OCSPA. It found the delays inexcusable, caused solely by Servpro, and made solely for its benefit as it pulled workers off of Homeowners' job to work on other jobs. The court found that this resulted in Homeowners having to return home while construction was ongoing as their insurance company refused to pay for further rentals outside of the home because of the time promised for construction completion. The court also found that Servpro's construction was "unconscionable" as it

painted the walls of the house without washing off soot from the fire, which caused the paint to blister and bubble, and failed to allow the cedar and pine for the kitchen and living rooms to acclimate to the home before installation, which caused it to shrink, gap, loosen, and bulge, which resulted in "substantial defects." The court also found that cedar oils bled through the finish and created unsightly stains and Servpro substituted rubber quarter round moldings for crown molding and installed them poorly. The court also noted that Servpro's roof tarping was poorly done and allowed water to enter and create icicles in the house.

{¶9} The court found that even if given the opportunity to correct defects, Servpro's suggested corrections would have been inadequate. The court noted that Servpro did not want to replace the cedar ceiling, but wanted only to tack it up, which would have left the boards shrunk and separated in length and width. The court explained that even though Servpro attempted to fill gaps in the cedar boards with putty and blamed Homeowners for suggesting the putty, the ceiling was "ugly with the putty and it was ugly without the putty. Either way it all has to come down and be replaced."

{¶10} Thus, the trial court found in favor of Homeowners. In calculating damages, the court found that Homeowner's out-of-pocket expenses to repair the defects, as testified to by their expert, was $23,248.76. The court awarded Homeowners $2,000.00 in non-economic damages for excessive delays, constructive eviction from the home due to the delays, and having to move back into their home while construction was ongoing. Accordingly, the court found that "straight damages" sustained by Homeowners amounted to $25,248.76. The court trebled these damages under the OCSPA, which totaled $75,746.28. The court then subtracted $27,685.06 as a credit to Servpro for the balance of the contract left unpaid, which resulted in a verdict for Homeowners in the amount of $48,061.22. The court explained that it gave the credit to Servpro because if Servpro did not receive it and paid damages, Servpro would pay damages twice, once for a discount and again for payment of damages. The court also denied attorney fees to Homeowners under the OCSPA. It acknowledged that it had the discretion to award the attorney fees, but concluded that it was inappropriate to award them in addition to treble damages.

{¶11} Servpro filed an appeal in this case and Homeowners filed a cross-appeal.

{¶12} Servpro's first assignment of error states:

> THE TRIAL COURT'S FINDING OF VIOLATIONS OF THE CONSUMER SALES PRACTICES ACT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶13} Servpro asserts that the trial court lost its way in finding that it violated the OCSPA. It acknowledges that pine for the source room ceiling was erroneously stated on the initial estimate for the job, but asserts that it was quickly corrected and the only pine delivered to the home was for the kitchen and living room. Servpro asserts that cedar was ultimately installed on the ceiling in the source room. Servpro also contends that the court's finding that it was "understandable" for it to use rubber quarter round rather than crown molding negates a finding that it was deceptive. Servpro further asserts that the court did not indicate whether it had considered the factors listed in R.C. 1345.02(B) to determine deceptiveness.

{¶14} Servpro additionally contends that the trial court did not consider the factors listed in R.C. 1345.03(B) in determining whether conduct is unconscionable, and even accepting the court's findings of gross construction delays and issues regarding paint and trim, improperly acclimated wood, and cedar oils bleeding through the finish, these acts do not rise to the level of unconscionability under the OCSPA. Servpro asserts that workmanship that does not meet a consumer's particular standards does not translate into deceptive or unconscionable conduct.

{¶15} When reviewing civil appeals from bench trials, an appellate court applies a manifest weight standard of review. *Revilo Tyluka, L.L.C. v. Simon Roofing & Sheet Metal Corp.,* 193 Ohio App.3d 535, 2011-Ohio-1922, 952 N.E.2d 1181 (8th Dist.), citing App.R. 12(C*), Seasons Coal v. Cleveland*, 10 Ohio St.3d 77, 461 N.E.2d 1273 (1984). Judgments supported by some competent, credible evidence going to all the material elements of the case must not be reversed as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Constr. Co*., 54 Ohio St.2d 279, 376 N.E.2d 578, syllabus (1978). *See, also, Gerijo, Inc. v. Fairfield*, 70 Ohio St.3d 223, 226, 638 N.E.2d 533 (1994). Reviewing courts must oblige every reasonable presumption in favor of the lower court's judgment and finding of facts. *Gerijo*, 70 Ohio St.3d at 226 (citing *Seasons Coal Co., supra*). If the evidence is susceptible to more than one interpretation, then we

must construe it consistently with the lower court's judgment. *Id*. In addition, the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts. *Kalain v. Smith*, 25 Ohio St.3d 157, 162, 495 N.E.2d 572 (1986).

{¶16} "The Ohio Consumer Sales Practices Act, set forth in R.C. Chapter 1345, is 'a remedial law which is designed to compensate for traditional consumer remedies and so must be liberally construed pursuant to R.C. 1.11.'" *Fink v. Daimler Chrysler Motors Corp.,* 7th Dist. Mahoning No. 03-MA-155, 2004-Ohio-5125, ¶ 12 quoting *Einhorn v. Ford Motor Co*., 48 Ohio St.3d 27, 548 N.E.2d 933 (1990). The OCSPA prohibits suppliers from engaging in two types of practices. R.C. 1345.02 prohibits suppliers from engaging in "unfair or deceptive" acts. R.C. 1345.03 prohibits suppliers from engaging in "unconscionable" acts. "[T]he CSPA defines 'unfair or deceptive consumer sales practices' as those that mislead consumers about the nature of the product they are receiving, while 'unconscionable acts or practices' relate to a supplier manipulating a consumer's understanding of the nature of the transaction at issue." *Johnson v. Microsoft Corp*., 106 Ohio St.3d 278, 2005-Ohio-4985, 834 N.E.2d 791, ¶ 24.

{¶17} R.C. 1345.02(B) provides a non-exhaustive list of practices that are considered unfair or deceptive. *Great v. Giant Eagle, Inc*., 8th Dist. Cuyahoga No. 108177, 2019-Ohio-4582, ¶ 13. Two of the listed practices that are relevant here are: "(2) That the subject of a consumer transaction is of a particular standard, quality, grade, style, prescription, or model, if it is not;" and "(5) That the subject of a consumer transaction has been supplied in accordance with a previous representation, if it has not, except that the act of a supplier in furnishing similar merchandise of equal or greater value as a good faith substitute does not violate this section." R.C. 1345.02(B)(2), (5).

{¶18} Proof of intent is not required to prove a deceptive act under R.C. 1345.02. *Hamilton v. Ball*, 4th Dist. Scioto No. 13CA3533, 2014-Ohio-1118, ¶ 38 quoting *Garber v. STS Concrete Co*., 8th Dist. Cuyahoga No. 99139, 2013-Ohio-2700. Whether an act is deceptive depends on how the consumer viewed the supplier's act or statement. *Tsirikos-Karapanos v. Ford Motor Co*., 2017-Ohio-8487, 99 N.E.3d 1203, (8th Dist.), citing *Frey v. Vin Devers, Inc.*, 80 Ohio App.3d 1, 6, 608 N.E.2d 796 (6th Dist.1992), citing *Thomas. Brown v. Bredenbeck*, Franklin C.P. No. 74CV–09–3493, 1975 WL 23888 (July 24, 1975). Accordingly, "if the supplier does or says something, regardless of intent, which has the

likelihood of inducing in the mind of the consumer a belief which is not in accord with the facts, the act or statement is deceptive." *Id*. While not every contract breach constitutes a OCSPA violation, "when a supplier knowingly commits a breach, the breach is likely also an unfair or deceptive act." *Cartwright v. Beverly Hills Floors*, 7th Dist. Mahoning No. 11 MA 109, 2013-Ohio-2266.

{¶19} R.C. 1345.03(B) also provides a non-exhaustive list of circumstances that a court should consider in determining whether an act is unconscionable. Relevant here is R.C. 1345.03(B), which states that an unconscionable act includes "(6) Whether the supplier knowingly made a misleading statement of opinion on which the consumer was likely to rely to the consumer's detriment." To establish an unconscionable act under R.C. 1345.03(A), "the consumer must show a degree of knowledge sufficient to establish scienter[,]" or actual awareness that the supplier was misrepresenting the facts pursuant to R.C. 1345.01(E). *Frank v. WNB Group, LLC*, 1st Dist. Hamilton No. C-180032, 2019-Ohio-1687, ¶ 36-37 citing *State ex rel. Celebrezze v. Ferraro*, 63 Ohio App.3d 168, 578 N.E.2d 492 (2d Dist.1989). R.C. 1345.01(E) defines "knowledge" as "actual awareness, but such actual awareness may be inferred where objective manifestations indicate that the individual involved acted with such awareness."

{¶20} Competent and credible evidence supports the court's finding of deceptive conduct. Servpro cites no authority requiring a court to state in its decision that it considered the list of conduct deemed deceptive under R.C. 1345.02(B). Further, the beginning of that statute states that it does not limit the scope of acts or practices considered unfair or deceptive. R.C. 1345.02(B) ("Without limiting the scope of division (A) of this section, the act or practice of a supplier in representing any of the following is deceptive").

{¶21} The trial court chose to attribute greater weight to the testimony of Homeowners over that of Servpro's owner and its employees. Jeff Holliday, the owner of this Servpro, testified that pine was purchased only for the kitchen because the pine-cedar issue was resolved prior to buying the wood. (Tr. 25, 72-73). Homeowner Emily Nelson testified to the contrary, stating that Servpro's former project manager, Steve Whitlinger, came to her rental property to discuss the cedar for the source room and brought a cedar board that she told him was unacceptable. (Tr. 172). When she

subsequently arrived at her house, she saw that pine was delivered. When she asked Mr. Whitlinger what the wood was for, he told her that it was all that he could get from the mill because the mill did not have the cedar that she requested. (Tr. 172). Homeowner Nelson testified that she asked Mr. Whitlinger for the name of the mill and she called the mill in front of him and asked if they had the cedar that she had requested. (Tr. 172). She verified that the mill had the cedar and the amount needed for the source room ceiling. (Tr. 172-173). Homeowner Nelson further testified that Mr. Whitlinger reloaded the pine into his truck and brought back the requested cedar. (Tr. 172-173). Homeowner Forrester also testified that he was present when Servpro employees brought pine to his home, and when he asked where the pine was going, Mr. Whitlinger and the workers told him that it was going onto the source room ceiling. (Tr. 260). He testified that he told them it was not going there and Servpro employees went back to the mill and came back with cedar. (Tr. 260).

{¶22} Homeowners were not required to show that Servpro actually intended to deceive them in order to prove an OCSPA violation. Rather, they needed only to show that Servpro's conduct had "the likelihood of inducing in the mind of the consumer a belief which is not in accord with the facts." *Tsirikos-Karapanos v. Ford Motor Co*., 2017-Ohio-8487, 99 N.E.3d 1203, (8th Dist.). It was reasonable for the court to find, based on Homeowners' testimony, that they believed that the pine delivered to their home was for installation on the source room ceiling and that Mr. Whitlinger was trying to deceive them as he told Homeowner Nelson that the mill did not have the cedar she requested when it did.

{¶23} Further, Servpro cites no support for its assertion that a trial court must state in its decision that it considered the non-exhaustive list of acts deemed "unconscionable" under R.C. 1345.03(B). The court in this case did discuss *Keeton v. Hinkle*, 5th Dist. Morrow No. CA 871, 2000 WL 329809 (Mar. 10, 2000), the case raised by Servpro, which discusses R.C. 1345.03(B). That case mentions R.C. 1345.03(B)(6) which would apply here, as it provides that one of the circumstances a court considers in determining whether a consumer act or practice is unconscionable is "[w]hether the supplier knowingly made a misleading statement of opinion on which the consumer was likely to rely to his detriment." *Id.* at *6, quoting R.C. 1345.03(B)(6).

{¶24} In finding that Servpro's delays were unconscionable, the court noted that, similar to *Keeton*, Homeowners were forced to move back into their unfinished home because "construction ran way over schedule," and the inexcusable delays were caused solely by Servpro for its benefit when it pulled workers off of Homeowners' job to work on other jobs. The court believed the testimony of Homeowners over Servpro employees, crediting Homeowner Nelson's testimony that a Servpro worker told her that some Servpro employees were pulled off of Homeowners' job to work on other jobs. There also seems to be no dispute that Homeowners were forced to return to their home while construction was ongoing because their insurance company stopped paying for them to reside outside of the home due to the delays caused by Servpro and its unfulfilled promises of completion dates.

{¶25} The court also detailed the workmanship issues that it found unconscionable, citing: the installation of the cedar and pine without acclimation, which caused the "unsightly" sagging, shrinking, and separated boards on the ceiling; the attempt to fix the gaps in the ceiling with putty, painting the walls without washing them; Homeowner Forrester having to show Servpro employees how to properly stain cedar; and the installation of rubber quarter round rather than crown molding. The court also credited the testimony of Homeowners and their expert, Brian Smith, of Remodeling Solutions, concerning the unconscionable workmanship. Mr. Smith testified that he walked through the home and his findings and opinion correlated with Homeowners' belief that the cedar and pine were not properly acclimated to the home before installation. He opined that the source room ceiling had to be totally removed because it was gapping, and boards were loose and separating. (Tr. 137-138). He explained that gapping was caused by inadequate acclimation, and loose boards were caused either by adhering it to the joist or inadequate nailing. (Tr. 138). Mr. Smith opined that the life of the kitchen and living room ceilings as installed were a few years at most and should last 30 years to a lifetime if installed and acclimated properly. (Tr. 141). He also opined that if those ceilings were left as is, they would take on moisture and boards could potentially fall off of the ceiling in a few years. (Tr. 141-142). He opined that the source room ceiling should last about 30 years if properly acclimated and installed, but the ceiling as installed was already past its life because it was already loose and gapping. (Tr. 145). He indicated

that the ceiling could fall at any time and someone could get hurt. *Id*. He explained that on a new construction, this should not happen. (*Id*.) Mr. Smith also noted that the molding that was installed was loose, and some was missing or had fallen off already. (Tr. 140-141). Mr. Smith estimated a total cost of $23,248.76 to repair the mistakes by Servpro. Defendant's Exhibit E.

{¶26} Finally, the court found that while Servpro was not permitted to correct the defects, the corrections it had offered Homeowners would be inadequate. The court explained that Servpro offered to tack up the ceilings, but not replace them, which would still leave the boards shrunk and separated in width and length. Mr. Smith had testified that tacking up the boards would secure them, but that was not an adequate repair or a long-term fix. (Tr. 141, 145).

{¶27} For these reasons, we find that competent, credible evidence supports the trial court's findings of deceptive and unconscionable acts under the OCSPA. The court chose to believe the testimony of Homeowners and their expert over that of Servpro and its employees.

{¶28} Accordingly, Servpro's first assignment of error lacks merit and is overruled.

{¶29} Servpro's second assignment of error states:

> THE TRIAL COURT ERRED AS A MATTER OF LAW BY FAILING TO SPECIFY ACTS OR PRACTICES IN VIOLATION OF THE LETTER AND INTENT OF THE CONSUMER SALES PRACTICES ACT.

{¶30} Servpro contends that the trial court erred by awarding treble damages under R.C. 1345.09(B) of the OCSPA because it failed to specify the findings required by the statute. *White v. Horneck*, 9th Dist. Wayne No. 01A0057, 2002-Ohio-3037. Servpro asserts that it therefore had no notice that its conduct violated the OCSPA.

{¶31} This Court reviews awards of treble damages de novo because determining "whether treble damages are appropriate is a question of law." *Averback v. Montrose Ford, Inc.,* 2019-Ohio-373, 120 N.E.3d 125 ¶ 35 (9th Dist.), quoting *Fleischer v. George*, 9th Dist. Medina No. 09CA0057-M, 2010-Ohio-3941, 2010 WL 3294295, ¶ 18.

{¶32} R.C. 1345.09(B) provides:

> (B) Where the violation was an act or practice declared to be deceptive or unconscionable by rule adopted under division (B)(2) of section 1345.05 of the Revised Code before the consumer transaction on which the action is based, or an act or practice determined by a court of this state to violate section 1345.02, 1345.03, or 1345.031 of the Revised Code and committed after the decision containing the determination has been made available for public inspection under division (A)(3) of section 1345.05 of the Revised Code, the consumer may rescind the transaction or recover, * * *, three times the amount of the consumer's actual economic damages or two hundred dollars, whichever is greater, plus an amount not exceeding five thousand dollars in noneconomic damages * * *.

{¶33} Treble damages under the OCSPA are punitive in nature, "intended to deter a seller from wrongful conduct." *Averback, supra,* quoting *Reagans v. MountainHigh Coachworks, Inc.*, 117 Ohio St.3d 22, 2008-Ohio-271, 881 N.E.2d 245, ¶ 34. In addition to the OCSPA statutes, two other sources can determine what constitutes an OCSPA violation: (1) rules adopted by the Ohio Attorney General and found in the Ohio Administrative Code and (2) court rulings. *See* R.C. 1345.05(B)(2) and (F); *Frey v. Vin Devers, Inc*., 80 Ohio App.3d 1, 6, 608 N.E.2d 796 (6th Dist.1992). The Ohio Attorney General makes judgments and supporting opinions available for public inspection via its Public Inspection File on its website. https://opif.ohioattorneygeneral.gov. This allows consumers, suppliers and lawyers to keep informed of judgments, rights and duties under the OCSPA. *Frank v. WNB Group, LLC*., 2019-Ohio-1687, 135 N.E.3d 1142, ¶ 17 (1st Dist.). The lack of a prior administrative or court decision does not bar a court from determining that conduct is unfair, deceptive, or unconscionable based upon the evidence before it. *Id.* at ¶ 19, citing *Hamilton v. Ball*, 2014-Ohio-1118, 7 N.E.3d 1241, ¶ 36 (4th Dist.). However, it does limit the remedies that a consumer has under R.C. 1345.09(B) because there is a lack of notice to the supplier of the conduct. *Id.*

{¶34} The trial court here trebled Homeowners' economic and noneconomic

damages. The only case the trial court mentioned in its decision relating to damages was "*Lockard v. Kno-Ho-Co Community Action Commission, Inc".*, 5th Dist. Coshocton No. 92-CA-21, 1993 WL 385359 (Sept. 20, 1993). Homeowners cited to *Lockard* in their proposed findings of fact and conclusions of law. In *Lockard,* the consumer entered into a contract with the supplier to weatherize her home, including re-venting her coal-burning stove and patching and sealing the roof. After the project was completed, the consumer had problems with her stove and roof. Supplier tried to repair the problems, but could not do so. *Lockard* brought an OCSPA claim and the jury awarded her $6,300.00 in damages. The court issued treble damages.

{¶35} The supplier in *Lockard* asserted on appeal that the trial court erred in awarding treble damages. The appellate court rejected this assertion, referring to two cases cited by the consumer relating to OSCPA violations that were available for public inspection with the Ohio Attorney General. *Lockard, supra,* at *5*,* citing *State ex rel. Celebrezze v. Goldste*in, Fairfield C.P. No. 53110 (June 20, 1985), unreported, and *Brown v. Potter,* Montgomery C.P. No. 81-1619 (Aug. 31, 1981), unreported. The *Lockard* Court quoted the holdings in those cases, respectively:

> A supplier's practice of failing to perform any home improvement services in a competent, satisfactory, and workmanlike manner, and then failing or refusing to correct any substandard work or defect, is unfair and deceptive in violation of Ohio Revised Code Section 1345.02.

Lockard, supra, quoting *Celebrezze*, *supra* at 2.

> Defendants, acting individually and in concert with one another, have performed shoddy and unworkmanlike services in connection with consumer transactions for home improvements in violation of Section 1345.02(B)(2) of Ohio Revised Code.

Lockard, supra, quoting *Brown*, *supra* at 3.

{¶36} The *Lockard* Court cited the jury verdict in its case and quoted the jury's answers to interrogatories, which included findings that the supplier: violated the OCSPA; failed to perform work in a competent and satisfactory manner; failed to investigate and respond to consumers' complaints within a reasonable time; and showed a lack of concern for the welfare and health of the consumers involved. *Lockard, supra*. The appellate court found that the prerequisites for awarding treble damages under the OCSPA were met because: the jury found that the supplier violated a specific consumer practice, as shown by the answers to the jury interrogatories; the rule existed prior to the sale; and the amount of damages was greater than $200.00. *Lockard*, supra at 5.

{¶37} In this case, we find that the court properly awarded treble damages because it found that Servpro acted deceptively in attempting to switch the pine for cedar in the source room and by installing rubber quarter round instead of crown molding. The court also found that Servpro acted unconscionably in its lengthy construction delays and overall workmanship on the ceilings with a refusal to properly correct them.

{¶38} *Lockard* does not address acts of attempting to switch products and installing a product not provided for in the contract. None of the cases cited to by Homeowners in their filings address these specific issues. However, in *Wiseman v. Kirkman*, 2d Dist. Darke No. 1575, 2002-Ohio-5384, ¶ 47, the Second District upheld a finding for treble damages when a supplier installed a cheaper brand of water softener in a consumer's home, even though it was identical in specifications to the water softener brand provided for in the contract. *Id*. at ¶ 55. The appellate court found that the trial court correctly held that this was a deceptive act under R.C. 1345.02(B)(2) because the supplier represented that the product was a particular style, grade, or model, the product was not, and the supplier pocketed the $150-$200 difference in price. *Id*. at ¶ 34-38. The appellate court cited *Clyde's Carpet, Inc. v. Banas*, Maumee M.C. No. CV-90-F-315 (Oct. 11, 1990), which was available for public inspection in the Ohio Attorney General files under PIF No. 10001157. In that case, the court ruled that a supplier committed a deceptive act under the OSCPA by installing a portion of a carpet roll not specifically chosen by the consumer as it lacked the color variation that she requested, even though it came from the same roll. *Id*.

{¶39} Similarly here, the trial court correctly concluded that Servpro acted deceptively under R.C. 1345.02(B)(2) and (5) by attempting to substitute pine for cedar. The court also correctly determined that Servpro acted deceptively under *Wiseman* and *Banas* by actually substituting rubber molding for crown. In any event, the trial court properly awarded treble damages based upon its unconscionability finding and *Lockard's* very general ruling. As explained above, the *Lockard* Court cited to the OSCPA regarding treble damages and to *Celebrezze* and *Brown,* where the courts found that the suppliers violated the OSCPA by failing to perform home improvement services in a competent and workmanlike manner and by failing or refusing to correct their substandard work or defects. *Lockard*, citing *Brown v. Potter*, Montgomery C.P. No. 81-1619 (Aug. 31, 1981), unreported, and *State ex rel. Celebrezze v. Goldstein*, Fairfield C.P. No. 53110 (June 20, 1985), unreported. As in *Lockard*, the trial court here found that Servpro's "inexcusable" and lengthy delays in completing the job and its "poor workmanship" on the ceilings constituted unconscionable acts in violation of the OSCPA. The trial court cited to *Lockard,* although it was in the attorney fees section of the decision. *Lockard* is available for public inspection on the Ohio Attorney General's website.

{¶40} Thus, the court's treble damages award is proper. The trial court here was much more specific than in *Lockard,* as it believed the testimony of Homeowners and their expert that Servpro failed to properly acclimate the pine and the cedar boards to the rooms before installation. The court further found that the "poor workmanship" in installing the pine and cedar wood "caused substantial defects." The court found that the "shrunk and separated boards" that resulted from the poor installation were "unsightly and sagging." Further, the trial court found that the Servpro offer to correct the defects was inadequate because it offered only to tack up the hanging ceiling boards and this would not remedy the shrinking and separating boards. The court also noted that Servpro attempted to remedy the gaps in the wood with putty as suggested by Homeowners, it did not matter because "it all has to come down and be replaced."

{¶41} Accordingly, Servpro's second assignment of error is without merit and is overruled.

{¶42} In its third assignment of error, Servpro asserts:

THE COURT FAILED TO PROPERLY CALCULATE DAMAGES.

{¶43} Servpro contends that the trial court erred in its damage calculation by not subtracting the $27,685.06 it was owed before it trebled damages. It also asserts that the court failed to subtract the $24,000.00-$27,000.00 that Homeowner Nelson testified Homeowners received from the mortgage company and did not forward to Servpro in accordance with their contract. Servpro asserts that had the court done so, this would have resulted in a windfall to Homeowners, even before the trebling of damages. This is because even if Homeowners used that money to pay for the $23,248.76 estimated to repair the defects in Servpro's work, Homeowners would still have money left over from the award. Servpro also challenges the trebling of noneconomic damages.

{¶44} Trial court awards of damages are reviewed for abuse of discretion. *Griffin Contracting and Restoration v. McIntyre*, 2018-Ohio-3121, 107 N.E.3d 22 ¶ 35 (12th Dist.), citing and quoting *Roberts v. United States Fid. & Guar. Co*., 75 Ohio St.3d 630, 634, 665 N.E.2d 664 (1996) ("[w]e will not disturb a decision of the trial court as to a determination of damages absent an abuse of discretion"). However, the standard of review is de novo for how a trial court measures damages and for a challenge to the sufficiency of the evidence relating to damages. *Younker v. Hayes*, 2018-Ohio-835, 108 N.E.3d 258, ¶ 23 (9th Dist.).

{¶45} We find that the trial court properly excluded the $24,000-$27,000 that Homeowners received but did not forward to Servpro. The only mention of this money was Homeowner Nelson's acknowledgement at trial that Homeowners received a check from the mortgage company and did not forward it to Servpro. No further evidence was offered or presented concerning this money by either party.

{¶46} Further, we find that the trial court correctly awarded Homeowners the proper measure of damages. The appropriate measure of damages for breach of a construction contract "is the cost to repair the deficient work, that is, the cost of placing the building in the condition contemplated by the parties at the time they entered into the contract." *Landis v. William Fannin Builders, Inc*., 193 Ohio App.3d 318, 2011-Ohio-1489, 951 N.E.2d 1078, ¶ 31 (10th Dist.), citing *Hansel v. Creative Concrete & Masonry Constr. Co.*, 148 Ohio App.3d 53, 59, 200-Ohio-198, 772 N.E.2d 138 (10th Dist.); and *Barton v. Ellis,* 34 Ohio App.3d 251, 255, 518 N.E.2d 18 (10th Dist. 1986).

{¶47} Had Servpro properly completed the contract, Homeowners would not have to pay Remodeling Solutions $23,248.76 to repair the defects caused by Servpro. The damage award puts the non-breaching parties in the position they would be had the contract been fully and properly performed. "[T]he measure of damages for a [O]CSPA claim involving deception is the expectancy interest." *Averback v. Montrose Ford*, 2019-Ohio-373, 120 N.E.3d 125, ¶ 38 (9th Dist.). Expectancy damages place the non-breaching party "in the position it would have been had the contract been fully performed." *Id.,* quoting *Alternatives Unlimited-Special, Inc. v. Ohio Dept. of Ed*., 10th Dist. Franklin No. 12AP-647, 2013-Ohio-3890, 2013 WL 4807016, ¶ 29. Here, Servpro fully performed the contract but provided unworkmanlike performance, unreasonable delays, and defects as to some of the provisions of the contract.

{¶48} The court credited Servpro $27,685.06, finding that Servpro would pay damages twice if it did not do so. The court reasoned that if Servpro did not receive the credit, it would be paying not only a discount to Homeowners by not getting paid for work it performed, but also damages in that amount. This credit is correct. In *Lynn v. Schulte*, 2015-Ohio-5527, 57 N.E.3d 162, ¶ 28 (11th Dist.), the appellate court found that the proper measure of damages when a contractor fully performs but materially breaches a construction contract "'is the cost of completing the work minus the unpaid part of the contract price.'" *Id*., quoting *ABLE Roofing v. Pingue*, 10th Dist. Franklin No. 10AP–404, 2011-Ohio-2868, 2011 WL 2418619, ¶ 24 (cases cited). Thus, not applying the credit to Servpro would result in a windfall for Homeowners, since they would receive damages from Servpro for the repairs by Remodeling Solutions, and they would receive the benefit of the work completed by Servpro but not yet paid.

{¶49} Servpro also asserts that the trial court erred by awarding noneconomic damages of $2,000.00 to Homeowners and the court erred by trebling these damages. Servpro contends that there was no evidence to support such damages and the court did not make a sufficient finding of intentionality in order to award them. They also contend that noneconomic damages should not have been trebled and the $27,685.06 owed on the contract should have been subtracted before trebling.

{¶50} R.C. 1345.09(B) provides for noneconomic damages up to $5,000.00 in addition to any actual economic damages. R.C. 2315.18 defines noneconomic loss as:

> nonpecuniary harm that results from an injury or loss to person or property that is a subject of a tort action, including, but not limited to, pain and suffering, loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education, disfigurement, mental anguish, and any other intangible loss.

{¶51} R.C. 2315.18(A)(4). Courts have awarded noneconomic damages under the OCSPA and other federal consumer protection laws for a consumer's inconvenience, mental distress, aggravation, and frustration. The Ohio Supreme Court has held that a consumer may recover damages for emotional distress under the OSCPA when the evidence shows that a supplier acted intentionally or maliciously. *Whitaker v. M.T. Automotive, Inc*., 111 Ohio St.3d 177, 2006-Ohio-5481, 855 N.E.2d 825, ¶ 22.

{¶52} In *Williams v. Gray Guy Group, LLC*., 2016-Ohio-8499, 79 N.E.3d 1146, ¶ 25 (10th Dist.), the Tenth District affirmed that noneconomic damages could be awarded to the consumers against a construction company that violated the OSCPA with unworkmanlike performance on their home that rendered it uninhabitable. The construction company subsequently abandoned the job. The consumers had to store their personal property and live with relatives while a new company repaired and completed the work on their house. They also had to withdraw money from their retirement account at a penalty in order to pay for the additional remedial work.

{¶53} The appellate court upheld an award of noneconomic damages for the time and effort the consumers endured from being displaced from their home and having to live with others and store their belongings while their house was under repair. Mrs. Williams testified to the displacement and deprivation of the family from having gatherings and celebrations at their home because it was uninhabitable. While the award of $30,000.00 in noneconomic damages was not upheld due to an OCSPA cap, the Ohio Supreme Court held that noneconomic damages are considered actual damages under the OCSPA and "actual damages, whether economic or noneconomic, are subject to trebling under R.C. 1345.09(B)." Thus, it appears that the court did not err in trebling the noneconomic damages in the instant case.

{¶54} As to the amount of noneconomic damages awarded, courts have held that '[e]vidence relative to pain and suffering in damage evaluations is within the province of the fact-finder.'" *Whitaker v. M.T. Automotive, Inc*., 9th Dist. Summit No. 21836, 2007-Ohio-7057, quoting *Bradley v. Cage*, 9th Dist. Summit No. 20713, 2002 WL 274638 (Feb. 27, 2002), *2 (quoting *Baughman v. Krebs*, 8th Dist. No. 73832, *4). The court's application of the law concerning noneconomic damages is subject to an abuse of discretion standard. *Williams v. Gray Guy Grp*., 2016-Ohio-8499, 79 N.E.3d 1146, ¶ 25 (10th Dist.). While courts have upheld noneconomic damages in OCSPA cases, Servpro cites no cases discussing how to calculate such damages. *Id.* at ¶ 12. The Ohio Supreme Court notes that "noneconomic damages are 'inherently subjective,' and 'difficult to evaluate.'" S*impkins v. Grace Brethren Church of Delaware, Ohio*, 149 Ohio St.3d 307, 2016-Ohio-8118, 75 N.E.3d 122, ¶ 49, quoting *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, ¶ 67.

{¶55} The trial court here awarded Homeowners $2,000.00 in noneconomic damages for "Delays and Constructive Eviction from Their Home Caused by Delays and from Being Forced to Move Back into the Residence While Substantial Construction Continued." The court explained that the excessive delays were inexcusable because they were caused solely by Servpro for its benefit when it pulled workers off of Homeowners' job to work at other jobs. The court also found that the unconscionable delays constructively evicted Homeowners and then forced them to return home while the home was still under construction because the insurance company stopped paying for rentals outside of the home due to Servpro's unfulfilled promised dates of completion. The court found that the gross delays could have been avoided and caused inconvenience and annoyance to everyone.

{¶56} Homeowner Nelson testified as to the delays, beginning early on when she came to the house and found icicles forming inside of the house as water was leaking through the tarp that Servpro installed. She indicated that she called Servpro many times because she was afraid that the cedar and other wood in the house would be damaged. (Tr. 167-169). Their repair of the tarp was delayed such that icicles formed on the inside of the house. She also testified that when they returned to live in the home while it was still under construction, the bedrooms and hallway to the bedrooms were livable, but the

rest was a "[c]onstruction site." (Tr. 169). She described construction equipment laying around the house, scaffoldings in the living room, nails and screws on the floor, and dust and filth lying around. *Id*. She noted that her 5-year-old returned home and she tried to keep all of her children out of the house as much as possible. *Id*. She testified that workers would show up and work on the house and then leave for 2-3 weeks at a time. (Tr. 184). Homeowner Nelson stated that one of the workers told her that Servpro told its workers not to go to her job but to go to work at different jobs. *Id*. She related her frustration with the delays and she told workers that she really wanted her family reunited as soon as possible in the home. (Tr. 215).

{¶57} We find this evidence sufficient for an award of noneconomic damages. The trial court was in the best position to determine witness credibility and evidence was presented as to Homeowners' frustration and inconvenience caused by Servpro's delays and having to return home during ongoing construction. While a finding of an OCSPA violation itself is not sufficient to establish malicious or intentional conduct, pulling workers from Homeowners' job to work on other jobs even though delays already existed on Homeowners' job is intentional, as well as installing the ceiling boards in an unworkmanlike manner. Telling Homeowner Nelson that the cedar that she requested was not available when she found out that it was, is also intentional. Further, expert testimony or testimony corroborating emotional distress is not necessary to award noneconomic damages. *See Greig v. Wallick*, 5th Dist. Tuscarawas No. 2010AP090036, 2012-Ohio-77, ¶ 61.

{¶58} Servpro also contends that the trial court erred by applying the $27,685.06 credit after it trebled damages rather than before trebling. We find that the trial court did not abuse its discretion by trebling damages first and then subtracting the credit. R.C. 1345.09(B) does not address when to apply a credit, whether before or after the trebling of damages. However, "actual damages proven, whether economic or noneconomic, are subject to trebling under R.C. 1345.09(B)." *Whitaker v. M.T. Automotive*, Inc, 111 Ohio St.3d 177, 2006-Ohio-5481, 855 N.E.2d 825, ¶ 22. There is no language providing that only net damages are subject to trebling. Further, the purpose behind trebling damages under the OCSPA is not to compensate a consumer, but to punish and deter the supplier for deceptive and unconscionable acts violative of the statute. *See Reagans v.*

MountainHigh Coachworks, Inc., 117 Ohio St.3d 22, 2008-Ohio-271, 881 N.E.2d 245, ¶ 34.

{¶59} Accordingly, Servpro's third assignment of error lacks merit and is overruled.

{¶60} In assignment of error number 4, Servpro contends:

> THE TRIAL COURT ERRED IN ACCEPTING APPELLEE'S EXPERT REPORT AS IT WAS NOT BROKEN DOWN PROPERLY AND BRIAN SMITH WAS NOT ADMITTED AS AN EXPERT.

{¶61} Servpro asserts that Mr. Smith was not properly admitted as an expert at trial and had only been to Homeowners' residence once more than a year ago. It also contends that Mr. Smith provided an alternative method for repairing the ceilings and he did not provide a breakdown of the costs for repairing each room. Servpro further asserts that Mr. Smith did not discuss the repair in the basement and he relied solely upon Homeowners' information about acclimation. Servpro cites *Marchese Concrete Company, Inc*. v. *Brad DeRubba,* 11th Dist. Trumbull No. 2004-T-0119, 2006-Ohio-330, for support on expert qualifications.

{¶62} Servpro's counsel cross-examined Mr. Smith at trial and made no objections concerning his qualifications as an expert, his project proposal estimate, or his testimony, findings, conclusions or opinions at trial. "The contemporaneous objection rule is a fundamental principle which appellate courts cannot easily disregard." *Mallin v. Mallin*, 44 Ohio App.3d 53, 54, 541 N.E.2d 116 (8th Dist.1988). This rule allows the questioner at trial to correct mistakes and allows the trial court to avoid error by correcting the mistakes*. Id.* By not objecting at trial to any issue regarding Mr. Smith, Servpro has waived this error on appellate review. *Hyams v. Cleveland Clinic Found*., 2012-Ohio-3945, 976 N.E.2d 297, ¶ 17-18 (8th Dist.).

{¶63} Even if we address this issue, it is otherwise without merit. Evid.R. 702 provides that the testimony of a witness must meet three requirements: (1) the testimony "must relate to matters beyond the knowledge or experience possessed by laypersons; (2) [the witness] must be qualified as an expert by specialized knowledge regarding the subject matter of the testimony; and, (3) [the] testimony must be based on reliable

scientific, technical, or other specialized information." *Levine v. Kellogg*, 2020-Ohio-1246, 153 N.E.3d 663, ¶ 63 (10th Dist.), quoting *Laketran Bd. of Trustees v. Mentor*, 11th Dist. Lake No. 2001-L-027, 2002-Ohio-3496, 2002 WL 1446958, ¶ 54 (July 3, 2002), citing Evid.R. 702. This Court's standard of review of a trial court's broad discretion as to admitting or excluding expert testimony is abuse of discretion. *Levine,* at ¶ *63,* citing *Biro v. Biro*, 11th Dist. Lake No. 2006-L-068, 2007-Ohio-3191, ¶ 28.

{¶64} In *Levine,* the Tenth District held that the trial court did not abuse its discretion during a bench trial when it failed to formally determine whether a witness was qualified as an expert and the opinions that could be elicited from the witness. *Levine*, at ¶ 67. The court held that a trial court is given broad leeway during a bench trial to determine the reliability of expert testimony and it is presumed that the trial court considers "only the relevant, material, and competent evidence in arriving at its judgment unless it affirmatively appears to the contrary." *Id*., quoting *In re Fair*, 11th Dist. Lake No. 2007-L-166, 2009-Ohio-683, 2009 WL 368380, ¶ 66, quoting *Jackson v. Herron*, 11th Dist. Lake No. 2003-L-145, 2005-Ohio-4046, 2005 WL 1861965, ¶ 28, quoting *State v. White*, 15 Ohio St.2d 146, 151, 239 N.E.2d 65 (1968).

{¶65} Here, testimony was elicited at trial as to Mr. Smith's qualifications and there is no evidence that the trial court considered anything other than relevant, material, and competent evidence. Mr. Smith testified to his licenses and certifications, his 21 years of construction and remodeling experience, and his past 11 years of ownership of Remodeling Solutions, a residential remodeling company specializing in all aspects of home remodeling, including ceilings. (Tr. 133-135). He testified that he walked through the home with Homeowners for an hour and they showed him the ceilings with the loose, gapping, and separated boards and molding that was not secure. (Tr. 136-137). He testified that, based upon his expertise and after observing and touching the ceilings, his opinion matched Homeowners' observations about the inadequate acclimation of the ceiling wood. (Tr. 136). He explained the acclimation process and the importance of allowing the wood to sit in the room where it was going to be installed for 7-10 days. (Tr. 137-146). He opined that the life-span of the source room ceiling as installed had already elapsed, as opposed to the 30-year lifespan it would have had if properly installed, because the boards were already loose and gapping and could actually fall and hurt

someone. (Tr. 145). He also opined that the life spans of the kitchen/living room area ceilings were about 30 years if installed properly, but as installed, the lifespan was maybe a few years. (Tr. 144). He indicated that he took a video of his walkthrough of the ceilings and house. (Tr. 145).

{¶66} Mr. Smith's project proposal was also reviewed at trial. (Tr. 137-146). The proposal separated the sunroom, living room/kitchen, and basement into sections and described the work to be done in each room. (Def. Exh. E). The proposal stated that the sunroom, living room and kitchen ceilings had to be removed because they were installed without proper acclimation, which caused loose boards and joints that were pulling apart. The report described molding in the living room/kitchen area that was gapping and loose and needed to be replaced. The proposal also stated that the track in the basement holding the drop ceiling needed to be reinforced as an area of the track was dropping. The report ended with a price quote of $23,248.76, for the "scope of labor with all materials."

{¶67} The *Marchese* case cited by Servpro is distinguishable. There, the principal of the company and contractor, Ray Marchese, testified on cross-examination to the industry standards for measuring the depth of concrete thickness and the trial court accepted this testimony in rendering its decision. *Marchese Concrete Co., Inc. v. Brad DeRubba*, 11th Dist. Trumbull No. 2004-T-0119, 2006-Ohio-330, ¶ 46-47. While acknowledging that Marchese was an experienced contractor in the installation of driveways, the appellate court held that he was not qualified as an expert in industry standards and no foundation was laid for his testimony as an expert in industry standards. *Id*. The appellate court therefore reversed the trial court's acceptance of this testimony as expert testimony concerning the industry standard. *Id.* Contrarily here, as recited above, Mr. Smith's qualifications as an expert were established at length and a proper foundation was laid concerning his expert testimony.

{¶68} Accordingly, we find no merit to Servpro's assignment of error concerning Mr. Smith's qualifications, testimony or report.

{¶69} Further, Mr. Smith did testify that short-term fixes could be applied to the wood in the sunroom and kitchen/living areas, such as nailing the loose boards back up onto the ceiling. However, he opined that it was improper to do this because it would not

last, did not conceal the fasteners, and could not be caulked to hide the remaining gapping issue. (Tr. 137-139).

{¶70} Also, contrary to Servpro's assertion, Mr. Smith did testify as to the part of the track in the basement that needed repair. (Tr. 143-144).

{¶71} Accordingly, Servpro's fourth assignment of error lacks merit and is overruled.

{¶72} Servpro's fifth assignment of error provides:

> THE TRIAL COURT IMPROPERLY UTILIZED THE COURT VIEWING OF THE SUBJECT RESIDENCE.

{¶73} Servpro contends that the trial court improperly used its viewing of Homeowners' residence to gather evidence and apply it at trial. Servpro asserts that little evidence of defective work was presented because Mr. Smith did not offer much in his testimony and Homeowners provided no pictures regarding the defects. Servpro implies that due to this lack of evidence, the trial court must have used its viewing of the home to gather evidence and make its determination.

{¶74} This assignment of error is without merit. R.C. 2315.02 allows for viewing the property that is the subject of litigation in a civil case. It is done to enable the trier of fact to understand and apply the evidence offered at trial. *Monus v. Day*, 7th Dist. Mahoning No. 10 MA 35, 2011-Ohio-3170, ¶ 47, citing *Lacy v. Uganda Invest. Corp.* 7 Ohio App.2d 237, 241, 195 N.E.2d 586 (8th Dist. 1964) and *Maggart v. Deaton,* 84 Ohio App. 327, 329, 87 N.E.2d 352 (2d Dist. 1948). A viewing of the property is not to gather evidence. *Lacy* at 241. A trial court may view the property when the case is tried before the bench, since the trial court assumes the role as trier of fact. *Monus* at ¶ 47, citing *State v. Eckard*, 11th Dist. Geauga No. 2001–G–2336, 2002–Ohio–3127, ¶ 14, citing *Peltier v. Smith*, 78 Ohio App. 171, 177, 66 N.E.2d 117 (2d Dist. 1946). The standard of appellate review for allowing a view of the property under R.C. 2315.02 is abuse of discretion. *Monus* at ¶ 48.

{¶75} In its decision, the trial court stated that it had viewed the home and while this was not evidence in the case, it was helpful in understanding the testimony of the witnesses relating to the defects alleged. This is in accord with the statute and the case

law. There is no evidence indicating that the trial court improperly used its view of the home in its decision or decision-making process.

{¶76} Servpro assumes that the trial court improperly used the view to gather evidence because it believes that "little evidence" was presented at trial of the defects. This is unsupported. The transcript of the trial shows that Homeowners provided extensive testimony concerning the extensive delays by Servpro, having to return to the home while it was still under construction because of the delays, the wood that they observed in their home for only a couple of days before it was installed, the installed moldings that were falling off the walls and not the molding provided for in the contract, and Mr. Whitlinger's attempt to substitute pine for cedar in the source room. Mr. Smith opined that the wood for the ceilings must not have been properly acclimated due to the gapping, separating, and loose boards he observed hanging on the ceilings.

{¶77} Photographs were not necessary to establish the defects with the ceilings, the molding, or the basement track, as Homeowners and Mr. Smith provided more than sufficient evidence about these defects. The court's view helped it to understand the testimony of Homeowners and Mr. Smith relating to these defects, how they were caused, and how they could be repaired. Further, photographs could not capture or establish Servpro's extensive delays, Homeowners having to return to their home while it was still under substantial construction, the wood installed before it was properly acclimated, and Mr. Whitlinger's attempt to substitute pine for cedar.

{¶78} Accordingly, Servpro's fifth assignment of error lacks merit and is overruled.

{¶79} On cross-appeal, Homeowners assert the following first assignment of error:

> THE TRIAL COURT ACTED UNREASONABLY BY NOT AWARDING ATTORNEY FEES.

{¶80} Homeowners contend that the trial court abused its discretion when it did not award them attorney fees under the OCSPA because throughout its decision, the court found that Servpro acted deceptively and unconscionably in its delays, performance and conduct. They assert that the court's findings reasonably led to a finding that Servpro

knowingly committed a consumer sales practice violation, which is the finding required to award attorney fees.

{¶81} This Court's review of a trial court's decision to award attorney fees under the OCSPA is abuse of discretion. The standard for awarding attorney fees under the OCSPA is higher than the standard for recovering treble damages under the OCSPA. *Cartwright v. Beverly Hills Floors*, 7th Dist. Mahoning No.11 MA 109, 2013-Ohio-2266, ¶ 41. To recover treble damages under the OCSPA, a court must find that a supplier committed a deceptive or unconscionable act or practice. *Id*., citing R.C. 1345.09(B). To award attorney fees under the OCSPA, the court must also "find that the supplier acted 'knowingly' in committing the deceptive/unconscionable act or practice." *Cartwright* at ¶ 41, citing R.C. 1345.09(F)(2). R.C. 1345.09(F) provides that a trial court "may" award attorney fees to a prevailing consumer if "the supplier has knowingly committed an act or practice that violates the OCSPA." R.C. 1345.09(F)(2). "Knowledge" for purposes of the statute "means awareness, but such actual awareness may be inferred where objective manifestations indicate that the individual involved acted with such awareness." R.C. 1345.01(E). The Ohio Supreme Court held that "knowingly" means "the supplier need only intentionally do the act that violates the Consumer Sales Practices Act." *Averback v. Montrose Ford, Inc.*, 2019-Ohio-373, 120 N.E.3d 125, ¶ 66 (9th Dist.), quoting *Einhorn v. Ford Motor Co.*, 48 Ohio St.3d 27, 30, 548 N.E.2d 933 (1990).

{¶82} However, the knowing commission of an act that violates the OCSPA does not mandate a court to impose attorney fees. *Charvat v. Ryan*, 116 Ohio St.3d 394, 2007-Ohio-6833, 879 N.E.2d 765, ¶ 27. The court still has the discretion to determine whether to do so and whether it is warranted under the facts of the case. *Id.* Again, R.C. 1345.09(F) provides that a trial court "may" award attorney fees as opposed to "shall."

{¶83} Here, the trial court denied attorney fees to Homeowners, finding that awarding attorney fees on top of treble damages was inappropriate. The court recognized its discretion in awarding attorney fees. While the court could have provided more of an explanation in declining to award attorney fees, we find that its decision to do so was not unreasonable, arbitrary, or unconscionable. Homeowners do not cite support for a finding of an abuse of discretion beyond asserting that attorney fees should have been awarded

due to the court's findings of knowing and deceptive conduct on the part of Servpro throughout its decision.

{¶84} Accordingly, Homeowners' first cross-assignment of error lacks merit and is overruled.

{¶85} Homeowners' second cross-assignment of error states:

> THE TRIAL COURT COMMITTED ERROR BY GIVING THE CONTRACT[OR] CREDIT FOR THE CHIMNEY REIMBURSEMENT; FURTHERMORE, THE TRIAL COURT SHOULD NOT HAVE SUBTRACTED THE BALANCE OWED ON THE CONTRACT FROM THE JUDGMENT AFTER IT TREBLED DAMAGES.

{¶86} Homeowners assert that the trial court erred in its damages award by including a credit to Servpro in the amount of $16,087.50 for the chimney replacement. They contend that Servpro refunded them part of its initial payment for the chimney replacement, yet added the chimney reimbursement money back into its final bill even though they did not perform the chimney work. Homeowners note that they received only one change order during the construction and every time a change was made thereafter, they received "a multipage cacophony of numbers and line items which were purposely done to confuse and hide issues." They refer to the initial estimate by Servpro (Servpro Exh. 6), a February 23, 2018 change order (Servpro Exh. 14), Mr. Holliday's testimony (Tr. 91-92), and the final bill that they received (Servpro Exh. 21).

{¶87} Servpro counters that the trial court's credit was correct because it wrote a check to Homeowners for $16,087.50 for the chimney work that Homeowners wanted another company to perform. Servpro concludes that it subtracted the $16,087.50 from its overall charges to Homeowners as part of its work billing, but then added it back in because Servpro issued Homeowners a check for $16,087.50 to secure another company for the chimney work.

{¶88} Generally, this Court "will not disturb a decision of the trial court as to a determination of damages absent an abuse of discretion." *Concrete Creations & Landscape Design LLC, Inc. v. Wilkinson,* 7th Dist. Carroll No. 20 CA 0946, 2021-Ohio-

2508, ¶ 99, quoting *Roberts v. United States Fid. & Guar. Co*., 75 Ohio St.3d 630, 634, 665 N.E.2d 664 (1996), citing *Blakemore,* 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). However, in a bench trial, the award of damages is reviewed under a manifest weight of the evidence standard. *See Doerschuk v. KLG Mobile Intensive Co*., *LLC,* 7th Dist. Columbiana No. 18 CO 0041, 2019-Ohio-5148, ¶ 11.

{¶89} While we weigh the evidence and consider witness credibility, we presume that the trial court's findings of fact are correct because the trial judge is in the best position to observe the witnesses and their demeanor, gestures and voice inflections, and use these observations in weighing credibility. *Id.* at ¶12, citing *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984). "A reviewing court should not reverse a decision simply because it holds a different opinion concerning the credibility of the witnesses and evidence submitted before the trial court. A finding of an error in law is a legitimate ground for reversal, but a difference of opinion on credibility of witnesses and evidence is not." *Id.* at ¶ 12, quoting *Seasons Coal Co., Inc*., at 80.

{¶90} The trial court here noted early on in its decision that the chimney repair cost of $16,087.50 caused confusion. It found that part of the original payments of $91,287.06 made to Servpro by Homeowners included the chimney expense. The court found that the parties agreed that another company would perform the chimney repair, so Servpro refunded the $16,087.50 to Homeowners by writing them a check in that amount. The court found that at this point, everything was correct as Servpro was now paid $75,199.56 for its work as it gave $16,087.50 to Homeowners for chimney repair by another company.

{¶91} The court then reviewed Servpro's final bill (Servpro's Exhibit 21), which showed a total rebuild/remodel price of $133,340.49, with a deduction for $16,087.50 for the chimney at line 3, but then an add-in of that amount at line 9. The court found that contrary to Homeowners' assertion, Servpro was not trying to collect for chimney repair that it did not do. Rather, the court held that in the final bill, the check issued by Servpro to Homeowners for $16,087.50 was not included. In making this finding, the trial court chose to believe the testimony of Mr. Holliday, the owner of this Servpro. He testified as to the final bill given Homeowners and how it was calculated. (Tr. 86). He explained that the "Grand total" amount was $133,340.49, which included the $16,087.50 that it was

going to charge in order to perform the chimney repair. (Tr. 58-61, 95). He testified that the $16,087.50 was then subtracted out of the final bill because Servpro did not perform the repair. (Tr. 96). Other amounts were also subtracted from the final bill. Thus, the total amount for work that Servpro completed was $94,276.92, which included the $16,087.50 for chimney repair that Servpro did not perform, but did not include the check that Servpro wrote to Homeowners for that repair to give to another company. Mr. Holliday explained that an add-on for pods was charged in the amount of $5,085.36. He indicated that the payments Servpro received totaled $91,287.06, which left a balance of $8,075.22. He explained that the $16,087.50 was added back in because even though it did not perform this repair and subtracted it from its final bill total to Homeowners, Servpro cut Homeowners a check from the money they received for the work that they did perform so that Homeowners could pay the other company for the chimney repair. (Tr. 96). Thus, the court found that Servpro's final bill subtracted the $16,087.50 from the total costs of its work and then added it back in because they gave Homeowners the money for the chimney repairs that the insurance company had paid to Servpro for other work it had performed. This testimony, coupled with the final bill and its calculations, constitutes competent, credible evidence from which the trial court based its findings.

{¶92} Homeowners further assert that the court erred when it credited the $27,685.06 balance owed to Servpro in the damages calculation. They contend that since the court found in their favor on Servpro's causes of action, and found that Servpro breached the contract and violated the OCSPA, Servpro was not entitled to the contract balance. The trial court awarded Homeowners $23,248.76, the amount that they would have to pay Mr. Smith for the repairs to the ceiling and basement, plus $2,000.00 for noneconomic damages. The court then trebled these damages and subtracted the $27,685.06 balance owed to Servpro for completed but unpaid work. The court explained:

> It might be argued that the Contractor should not receive credit for the $27,685.06 balance because he is in breach. However, if the Contractor does not receive credit for the balance AND pays damages [fn 4] then he will effectively pay damages twice, once as a discount and then again in payment of damages.

{¶93} Again, the trial court's credit to Servpro for the unpaid balance of the contract is proper. Although the court found in favor of Homeowners, Servpro nevertheless completed the work under the contract and did not receive the balance owed for this work. As cited above in conjunction with Servpro's third assignment of error, the appellate court in *Lynn v. Schulte*, 2015-Ohio-5527, 57 N.E.3d 162, ¶ 28 (11th Dist.), held that where a contractor breaches a contract and a portion of the contract is left unpaid, the proper measure of damages is the cost for the owner having to complete the work minus the part of the contract left unpaid. The trial court correctly found that if it did not credit Servpro with the work it already performed, albeit deficiently and violative of the OSCPA, Homeowners would receive the benefit of the non-defective work left unpaid, and damages to repair the defective work. This would be a double recovery and windfall to Homeowners, rather than a double payment by Servpro.

{¶94} Accordingly, Homeowner's second cross-assignment of error lacks merit and is overruled.

{¶95} For the above reasons, this Court finds no merit to Servpro's assignments of error and no merit to Homeowners' cross-assignments of error. The judgment of the trial court is affirmed.

Robb, J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Jefferson County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.