[Cite as *Grgat v. Giant Eagle, Inc.*, 2019-Ohio-4582.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

MICHAEL GRGAT, :

Plaintiff-Appellant, :

No. 108177

v. :

GIANT EAGLE, INC., :

Defendant-Appellee. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: November 7, 2019

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-18-892339

Appearances:

Jeremy Gilman, Attorney, L.L.C., and Jeremy Gilman; Harvey Abens Iosue Co., L.P.A., Matthew Abens, Jason T. Hartzell, and David L. Harvey, III, *for appellant*.

Hanna, Campbell & Powell, L.L.P., and Anne M. Markowski, *for appellee*.

EILEEN T. GALLAGHER, P.J.:

{¶ 1} Plaintiff-appellant, Michael Grgat, appeals an order granting summary judgment in favor of defendant-appellee, Giant Eagle Inc. and denying Grgat's motion for summary judgment. He claims the following two errors:

1. The trial court erred by granting Giant Eagle's summary judgment motion.

2. The trial court erred by denying appellant's summary judgment motion.

{¶ 2} We find no merit to the appeal and affirm the trial court's judgment.

I. Facts and Procedural History

{¶ 3} Grgat filed a complaint seeking declaratory and injunctive relief under the Ohio Consumer Sales Practices Act ("CSPA"), alleging that Giant Eagle engaged in deceptive acts and practices in violation of R.C. 1345.02(A). Grgat alleged that Giant Eagle's "multi-unit pricing" promotions misrepresented that a specific price advantage exists, when it does not. The complaint alleged, in relevant part, that "Giant Eagle regularly runs price promotions in which it represents to consumers though [sic] in-store signage that if they buy from Giant Eagle a specific number of units of a particular product during a certain period of time, they will receive a specific discount on those items." (Complaint ¶ 6.) The complaint further alleged:

> 11. These price promotions impart to consumers that in order for them to qualify for the discount Giant Eagle offers in that promotion, they must buy from Giant Eagle the specific number of product units identified by Giant Eagle in each particular promotion.
>
> 12. Giant Eagle, however, fails to disclose to its customers that they would also receive the same proportionate discount during that price promotion even if they were to purchase *fewer* than the number of units specified in each ad.
>
> * * *
>
> 16. By concealing that information from its customers during its price promotions, Giant Eagle deceives its customers into believing that they

> will receive a price advantage only by buying the specific number of units identified in its ads, when, in fact, they will not.[1]

(Emphasis in original.)

{¶ 4} Christopher Forde, Giant Eagle's director of center store grocery, explained at deposition that "multi-unit pricing" refers to "a price point" identifying a number of units for a given price. (Forde depo. at 49.) When Giant Eagle runs multi-unit-pricing promotions, it displays a price tag on the shelf underneath the promoted product that lists the regular price of the item, the multi-unit-sale price, the potential savings, and the end date of the sale. (Forde depo. at 71, 81.) Multi-unit-pricing promotions are also advertised on signs within the store and in Giant Eagle's weekly circular, which is mailed to its customers.

{¶ 5} In December 2017, Giant Eagle ran a promotion on Dei Fratelli fire roasted pizza sauce. (Forde depo. at 107.) The regular price of a 15-ounce can of pizza sauce was $1.69. During the sale, the price tag indicated that customers who use their "Giant Eagle advantage cards" could buy ten cans of pizza sauce for $10 during the promotional period. In addition to presenting the multi-unit-sale price, the tag indicated that the purchase of ten cans would result in a savings of $6.90. Thus, when Giant Eagle ran this multi-unit-pricing promotion, it represented to

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[1] R.C. 1345.02(B)(8) of the Consumer Sales Practices Act provides that a supplier's representation is a deceptive act or practice if the supplier represents "[t]hat a specific price advantage exists, if it does not." Although Grgat did not cite R.C. 1345.02(B)(8) in the complaint, the allegations in the complaint were sufficient to put Giant Eagle on notice that it was claiming a violation of R.C. 1345.02(B)(8) based on specific factual allegations and the allegation that Giant Eagle committed deceptive practices in violation of R.C. 1345.02(A).

consumers that, for a limited time, there was a specific price advantage on the cost of ten cans of pizza sauce.

{¶ 6} Forde testified that if a consumer using a Giant Eagle advantage card purchased a single can of the pizza sauce during the promotional period, the single can would cost $1.00. (Forde depo. at 108.) Customers were not required to buy ten cans of pizza sauce in order to derive the same price advantage as if they bought ten cans. The pro rata price of a single can, however, was not listed on the price tag. (Forde depo. at 109.) In other words, Giant Eagle did not expressly state that customers are not required to buy the total amount identified in a multi-unit-promotion in order to receive the price advantage described on the shelf tag.

{¶ 7} Giant Eagle filed a motion for summary judgment, arguing that the representations in its multi-unit promotions were completely true and were not deceptive. Grgat also filed a motion for summary judgment, claiming the representations were deceptive as a matter of law. In an affidavit submitted in support of Grgat's motion, he stated that he had purchased goods at Giant Eagle on several occasions for his own and his family's personal use, but did not provide any information as to whether he had been deceived in any fashion.

{¶ 8} The trial court granted Giant Eagle's motion for summary judgment and denied Grgat's motion for summary judgment. In its journal entry, the court stated, in relevant part:

> In order to be deceptive, and therefore actionable, a supplier's act must not only be at variance with the truth but must also concern a matter that is or is likely to be material to a consumer's decision to purchase

> the product or service involved. * * * Plaintiff does not dispute the discount is available to a consumer with a Giant Eagle advantage card who buys more or less than the stated units. By displaying a price as "10 for $10" or "4 for $5," Giant Eagle does not misrepresent the sale price as displayed because it charges the proportionate sale price at checkout. It is undisputed that the consumer receives the multiple unit discount on any amount of units purchased with no minimum or maximum required. Plaintiff fails to satisfy the element of falsity to prove that Giant Eagle's multiple-unit pricing as displayed on the shelf tags adjacent to the promotional product is deceptive under the CSPA.

{¶ 9} Grgat now appeals the trial court's judgment.

II. Law and Analysis

A. Standard of Review

{¶ 10} Appellate review of summary judgments is de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Pursuant to Civ.R. 56(C), summary judgment is appropriate when (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his or her favor. *Horton v. Harwick Chem. Corp.*, 73 Ohio St.3d 679, 653 N.E.2d 1196 (1995), paragraph three of the syllabus; *Zivich v. Mentor Soccer Club*, 82 Ohio St.3d 367, 696 N.E.2d 201 (1998). The party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Dresher v. Burt*, 75 Ohio St.3d 280, 662 N.E.2d 264 (1996).

B. Deceptive Practices

{¶ 11} In his two assigned errors, Grgat argues the trial court erred in granting Giant Eagle's motion for summary judgment and in denying his motion for summary judgment. In both assigned errors, Grgat contends the trial court erred in finding that Giant Eagle's multi-unit pricing promotions were not deceptive practices as defined by R.C. 1345.02(B)(8). He asserts that Giant Eagle's multi-unit-pricing promotions were "deceptive per se" and did not require him to prove that they were either false or material to the consumer transaction because R.C. 1345.02 is a strict liability statute.

{¶ 12} The CSPA was enacted in 1972 and prohibits suppliers from committing unfair, deceptive, or unconscionable acts or practices in connection with consumer transactions. R.C. 1345.02 and 1345.03. R.C. 1345.02 states, in relevant part:

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

R.C. 1345.02(A).

{¶ 13} R.C. 1345.02(B) provides a nonexhaustive list of practices that are deceptive. The list describes a variety of representations, followed by a phrase indicating that the representation does not accurately reflect the truth. For example, R.C. 1345.02(B)(3) provides that a supplier's representation is "deceptive" if it represents "[t]hat the subject of a consumer transaction is new, or unused, if it is

not[.]" As relevant to this appeal, R.C. 1345.02(B)(8) states that a supplier's act or practice is "deceptive" if it represents "[t]hat a specific price advantage exists, if it does not[.]"

{¶ 14} Grgat argues he was not required to prove that Giant Eagle's multi-unit-pricing promotions were "false" because "[n]othing in that text requires a claimant to prove 'falsity' as a condition to establishing that a supplier acted deceptively under R.C. 1345.02(B)(8)." (Appellant's brief at 25.) He contends the trial court erroneously "inserted a falsity requirement into the unambiguous text of those statutes under the guise of interpreting them * * *." (Appellant's brief at 25.)

{¶ 15} We agree the language of R.C. 1345.02(B)(8) is unambiguous. However, simply because the statute does not use the term "falsity" does not mean proof of falsity is not required in order to establish that an act or practice is deceptive. "Falsity" is generally defined as "the condition or quality of being false." *Webster's New World Dictionary* 489 (1994). The word "false" is defined, in part, as "untruthful," "not true," "misleading," and "meant to deceive." *Webster's New World Dictionary* 489 (1994). In other words, if a supplier represents that the subject of a consumer transaction is new, or unused, but it is not, the representation is false. If the supplier represents that a specific price advantage exists, but it does not, then the supplier has made a false misrepresentation. Although R.C. 1345.02 does not use the word "falsity" or "false," each and every deceptive practice listed in the R.C. 1345.02 describes a misrepresentation of the truth, i.e., a falsity. Therefore,

the trial court did not insert a falsity requirement into the text of the statute; falsity is the essence of deception.

{¶ 16} Grgat also contends the trial court erroneously inserted a materiality requirement into the statute that does not exit. Although the R.C. 1345.02 does not explicitly state that misrepresentations must be material to the transaction, it is well established that a deceptive act or practice under the CSPA is one that "'has the tendency or capacity to mislead consumers concerning a fact or circumstance *material* to a decision to purchase the product or service offered for sale.'" (Emphasis added.) *Richards v. Beechmont Volvo*, 127 Ohio App.3d 188, 711 N.E.2d 1088 (1st Dist.1998), quoting *Cranford v. Joseph Airport Toyota, Inc.*, 2d Dist. Montgomery No. 15408, 1996 Ohio App. LEXIS 2252 (May 17, 1996). *See also Davis v. Byers Volvo*, 4th Dist. Pike No. 11CA817, 2012-Ohio-882, ¶ 29. The court in *Davis* held, in relevant part:

> "In order to be deceptive, and therefore actionable, a [supplier's] act must not only be at variance with the truth but must also concern a matter that is or is likely to be material to a consumer's decision to purchase the product or service involved. A matter that is merely incidental to the choices a consumer must make when deciding to engage in the transaction is, therefore, not 'deceptive' within the meaning of the [CSPA] * * *."

Davis at ¶ 29, quoting *Cranford*. Therefore, as the trial court correctly found, in order to be "deceptive" under the CSPA, the act or practice in question must be both false and material to the consumer transaction.

{¶ 17} Furthermore, there is nothing in the plain language of R.C. 1345.02(B) that indicates a purpose to impose strict liability. And courts have

declined to interpret the statute in a manner that would impose strict liability. *See e.g.*, *Helton v. U.S. Restoration & Remodeling, Inc.*, 10th Dist. Franklin No. 14AP-899, 2016-Ohio-1232, ¶ 72 (noting that the Tenth District has declined to adopt a strict liability standard for certain violations of CSPA), citing *Conley v. Lindsay Acura*, 123 Ohio App.3d 570, 575, 704 N.E.2d 1246 (10th Dist.1997) (rejecting argument that the CSPA's prohibition against deceptive practices is a strict liability statute).

{¶ 18} Rather than applying strict liability, courts have held that whether a supplier's act or omission is a violation of the CSPA depends on how a reasonable consumer would view it. Instead of considering a supplier's acts or practices as "deceptive per se," the test is whether the alleged act or practice "'has the likelihood of inducing a state of mind in the consumer that is not in accord with the facts.'" *Chesnut v. Progressive Cas. Ins. Co.*, 166 Ohio App.3d 299, 2006-Ohio-2080, 850 N.E.2d 751, ¶ 23 (8th Dist.) quoting *McCullough v. Spitzer Motor Ctr., Inc.*, 8th Dist. Cuyahoga No. 64465, 1994 Ohio App. LEXIS 262 (Jan. 27, 1994). Therefore, despite Grgat's argument to the contrary, R.C. 1345.02(B)(8) is not a strict liability statute.

{¶ 19} An act or practice under R.C. 1345.02(B)(8) is not deceptive unless the supplier represents "that a specific price advantage exists, if it does not." Grgat presented no evidence that any of Giant Eagle's multi-unit pricing promotions represented that a specific price advantage existed when it did not. In support of his claims, Grgat produced evidence that Giant Eagle offered a "multi-unit pricing" promotion on Dei Fratelli fire roasted pizza sauce from December 7, 2017 through

December 13, 2017. The promotion stated that the regular price for a can of the pizza sauce was $1.69. During the promotion, the shelf tag indicated that consumers could purchase ten cans for $10.00, which represented a total savings of $6.90 on ten cans. There is nothing deceptive or untrue about this representation.[2]

{¶ 20} Grgat also presented evidence that Giant Eagle offered a multi-unit pricing promotion on Bush chili beans from February 8, 2018 through March 21, 2018. The shelf tag for the beans indicated that a regular can of beans was $1.49, but a consumer could purchase four cans for $5.00 during the sale period. The shelf tag also indicated that consumers could save a total of $ .96 on the purchase of four cans.[3] Giant Eagle similarly offered a multi-unit pricing promotion on Hamburger Helper Deluxe Cheeseburger Mac from December 7, 2017 through December 13, 2017. As in the other examples, the shelf tag indicated that the regular price was two boxes for $3.00. The shelf tag further indicated that, during the sale, consumers could buy ten boxes for $10.00 for a total savings of $5.00 on ten boxes. Again, there is nothing deceptive or inaccurate about these representations.[4]

{¶ 21} Grgat nevertheless contends the shelf tags are deceptive because they did not communicate the fact that customers could purchase less than the total number of items advertised and still receive the sale price per individual unit. It is

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[2] A savings of $ .69 per can on ten cans equates to a total savings of $6.90.

[3] Four cans of beans at the regular price would cost $5.96 ($1.49 x 4 = $5.96.) Therefore, a purchase of four cans for $5.00 would save a total of $.96 ($5.96-$5.00=$.96.)

[4] The regular price was two for $3.00 or $1.50 per box. The sale offered ten boxes for $10.00, which equates to $1.00 per box or a savings of $.50 per box. Therefore, ten boxes for $10.00 provides a total savings of $5.00.

undisputed that if a customer buys more or fewer than, for example, ten cans of pizza sauce, the customer will pay the pro-rata price per can. (Appellant's brief at 23.) Grgat argues that the shelf tags are deceptive because they indicate that customers can only yield the specific savings advertised therein by purchasing the total number of units in the multi-unit pricing promotion.

{¶ 22} However, the fact that Giant Eagle did not advertise the pro-rata price per can is not, by itself, deceptive. There is no evidence that the shelf tags, signs, or circulars stated that customers had to buy the total amount of items advertised in the promotion in order to get the promotional price, when such was not the case. And there is no evidence that the shelf tags, signs, or circulars advertised a specific price advantage on, for example, the purchase of ten cans of pizza sauce for $10.00 and then charged unsuspecting consumers the nonsale price on lesser quantities.

{¶ 23} The undisputed evidence shows that when a customer buys lesser quantities of a product subject to a multi-unit pricing promotion, the customer is explicitly informed in writing of the unit price of a "10 for 10" type of promotion on the computer screen facing the customer when the product is scanned at the checkout before the customer pays for the item. (Maloney aff. ¶ 13-15.) The same per-unit, pro-rata cost of a particular sale item is also set out in writing in the customer's receipt.[5] Furthermore, James Bainbridge, a senior creative manager in

[5] Giant Eagle records of purchases made with Grgat's Giant Eagle Advantage Card show that he purchased canned pineapple, soup, and pudding in November 2016 under multi-unit price promotions, purchased less than the number of units on the shelf tags, and paid the pro-rata price per item. (Sharon Zaspel aff. ¶ 3-12.)

charge of designing the shelf tags, averred by way of affidavit that if a customer must buy the total amount of product listed in a multi-unit pricing promotion in order to get the sale price, the per-unit price for lesser quantities is expressly stated in the tag or sign. (Bainbridge aff. ¶ 6.) Therefore, Grgat has failed to produce any evidence that Giant Eagle engaged in any deceptive acts or practices in violation of R.C. 1345.02(B)(8).

{¶ 24} Grgat nevertheless contends that the trial court erred in applying Ohio Adm.Code. 109-4-3-02. The trial court concluded that Giant Eagle's multi-unit pricing promotions were not deceptive because, in accordance with Ohio Adm.Code 109-4-3-02, no minimum or maximum amount had to be purchased in order to receive the advertised promotional price. Grgat contends this administrative rule is inapplicable to the CSPA.

{¶ 25} However, the Ohio attorney general has authority under R.C. 1345.05(B)(2) to "[a]dopt, amend, and repeal substantive rules defining with reasonable specificity acts or practices that violate sections 1345.02 * * * of the Revised Code." Ohio Adm.Code 109-4-3-02 states that it was enacted pursuant to the authority provided in R.C. 1345.05 for the purpose of elaborating on the provisions set forth in R.C. 1345.02.

{¶ 26} The trial court quoted the following language from Ohio Adm.Code 109-4-3-02 in reaching its conclusion:

> (A)(1) It is a deceptive act or practice in connection with a consumer transaction for a supplier, in the sale or offering for sale of goods or services, to make any offer in written or printed advertising or

> promotional literature without stating clearly and conspicuously in close proximity to the words stating the offer any material exclusions, reservations, limitations, modifications, or conditions. Disclosure shall be easily legible to anyone reading the advertising or promotional literature and shall be sufficiently specific so as to leave no reasonable probability that the terms of the offer might be misunderstood.
>
> (2) The following are examples of the types of material exclusions, reservations, limitations, modifications, or conditions of offers which must be clearly stated:
>
> * * *
>
> (g) If there is a minimum amount (or maximum amount) that must be purchased for the advertised price to apply, that fact must be stated.

{¶ 27} As previously stated, R.C. 1345.02(B) provides a nonexhaustive list of acts and practices that constitute deceptive practices in violation of the CSPA. Ohio Adm.Code 109:4-3-02 provides additional examples of acts or practices that may be considered deceptive under the CSPA. It, therefore, complies with R.C. 1345.05 and provides additional binding authority on courts charged with adjudicating allegations of deceptive acts and practices under the CSPA.

{¶ 28} Moreover, the court's finding that Giant Eagle did not violate R.C. 1345.02(B)(8) even though it did not expressly disclose the fact that the purchase of lesser quantities than the total number indicated in multi-unit pricing promotions would be charged the pro-rata price per individual item comports with the specific language of Ohio Adm.Code 109-4-3-02(A)(2)(g). We, therefore, concur with the trial court's judgment.

{¶ 29} The first and second assignments of error are overruled.

{¶ 30} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

EILEEN T. GALLAGHER, PRESIDING JUDGE

ANITA LASTER MAYS, J., and
EILEEN A. GALLAGHER, J., CONCUR