[Cite as *DeCola v. Pete Wing Contracting*, 2010-Ohio-2283.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

LOUIS A. DECOLA, JR., et al.,	:	**O P I N I O N**
Plaintiffs-Appellants,	:	**CASE NO. 2009-A-0012**
- vs -	:	
PETE WING CONTRACTING, INC., et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Court of Common Pleas, Case No. 2007 CV 1183.

Judgment: Affirmed.

Christopher J. Boeman, 3537 North Ridge Road, Perry, OH 44081 (For Plaintiffs-Appellants).

Gary L. Pasqualone, Curry and Pasqualone, 302 South Broadway, Geneva, OH 44041 (For Defendants-Appellees Pete Wing Contracting, Inc. and Pete J. Wing).

J. Charles Ruiz-Bueno, Weltman, Weinberg & Reis Co., L.P.A., Lakeside Place, Suite 200, 323 West Lakeside Avenue, Cleveland, OH 44113-1099 (For Defendant-Appellee Sky Bank).

TIMOTHY P. CANNON, J.

{¶1} Appellants, Louis A. DeCola, Jr. and Yelena DeCola, appeal from the trial court's February 9, 2009 judgment entry. For the reasons that follow, we hold the trial court did not err in granting appellees' motions for directed verdict. We further find that the jury's verdict was not against the manifest weight of the evidence. We affirm the judgment of the trial court.

{¶2} The instant matter emanates from the construction of the DeColas' residence located at 779 Garrison Road, Ashtabula, Ohio. The DeColas contracted with Appellees Pete Wing Contracting, Inc. and Pete J. Wing (collectively referred to as "Wing") for the construction of their residence. The construction was financed by Appellee Sky Bank.[1]

{¶3} The DeColas filed a complaint against Wing, Sky Bank, and the Ashtabula County Building Department alleging violations of the Consumer Sales Practices Act, breach of contract, breach of warranty, and negligence. The trial court granted the Ashtabula County Building Department's motion for summary judgment on September 22, 2008.

{¶4} The matter proceeded to a jury trial on January 26, 2009. At the close of the DeColas' case-in-chief, Wing and Sky Bank moved for directed verdicts. The trial court granted the motion in favor of Sky Bank on all counts and granted the motion in favor of Wing on the Consumer Sales Practices Act and negligence counts. The jury returned a verdict for Wing on all remaining counts.

{¶5} The following facts are relevant to the disposition of this appeal.

{¶6} On June 18, 2004, Wing and the DeColas entered into a contract for the residence to be built at the bid price of $294,383. On July 29, 2004, the DeColas executed a Consumer Construction Loan Agreement for financing the cost of construction of the home with Sky Bank. This loan required interest-only payments until the agreed completion date of April 29, 2005. The DeColas and Sky Bank also executed a Residential Construction Loan Rider Amending Note.

1. For purposes of this appeal, we will refer to appellee as Sky Bank, although it has since merged with The Huntington National Bank.

{¶7} With each phase of the construction, inspections were performed by the Ashtabula County Building Department. Additionally, Sky Bank hired Mr. Robert English, a licensed real estate appraiser, to conduct an initial appraisal report. He was also to conduct inspections when a request for a draw on the construction loan was made to Sky Bank. Mr. English testified that he conducted two construction loan inspections; however, because of Mr. DeCola's request for an independent third party, he withdrew from the project in a letter dated October 27, 2004. Thereafter, Sky Bank informed the DeColas that Mr. English had resigned from the project and that the DeColas "will need to pick an approved independent inspector to complete the process." The DeColas never agreed to pay for a third party to inspect the residence.

{¶8} Mr. DeCola testified that there were issues with the house beginning July 21, 2004. Mr. DeCola testified that he thought it was essential to build the residence according to the plans, stating that Wing did not indicate the plans were inadequate or incomplete at the time of signing the contract for construction of the residence. In December 2004, the DeColas notified Sky Bank that no additional draws were to occur until the problems identified with the residence were addressed. On December 6, 2004, Sky Bank issued an e-mail to the DeColas that it was "not passing judgment on workmanship issues." The project was at a standstill.

{¶9} During this time, Sky Bank contracted with Mr. Richard Beck, a registered architect, to inspect the residence. Mr. Beck was to "assist *** in providing on-site inspection of exterior foundation walls at brick overhand area." Mr. Beck testified that he inspected the home in late December 2004 or early January 2005. In a letter dated January 7, 2005, Mr. Beck indicated that the prints he was shown of the home included

a crawl space foundation plan but no basement foundation plan. He also noted, inter alia, the architectural drawings had numerous dimensional errors on them; the floors were bouncy; there were no cracks in the drywall; and that a basement foundation plan should be drawn with a "structural engineer analysis to indicate any point loads that might impact existing first floor joists." In a follow-up letter dated January 13, 2005, Mr. Beck stated, "my observation at the site was all appeared structurally sound." Mr. Beck further testified at trial that he did not find any structural defects at the residence.

{¶10} The DeColas requested Mr. Beck's report, but Sky Bank refused to provide them with a copy. In a letter dated February 7, 2005, Sky Bank indicated that Mr. Beck's inspection was performed "for the sole interest of Sky Bank."

{¶11} Amy Patrick, the construction loan coordinator on this project, also testified. Ms. Patrick stated that if the bank had discovered that a "home they are originating a loan on was structurally unsound," they would tell both the homeowner and the builder. Ms. Patrick also testified that Mr. Beck's report was done on behalf of Sky Bank, and, based on normal bank procedures, the report was not released to either the DeColas or Wing. She also noted that while Sky Bank did have a contractual relationship with the DeColas, it did not have a contractual relationship with Wing.

{¶12} Pete Wing testified that during the standstill he suggested to the DeColas that they could hire Mr. Beck to hash out the list of items they had been "bickering about." Wing stated that he drafted a contract between himself, the DeColas, and Mr. Beck outlining approximately 15 items with respect to the residence. Wing stated that the DeColas added a clause so that Mr. Beck would not "double-dip and double charge." Mr. Beck testified at trial that he did not accept the offer, as he believed the

matter would end in litigation. Wing testified that he then suggested "four or five other architects – or engineers" to no avail.

{¶13} Wing made another written proposal on January 26, 2005, to jointly hire a third neutral party qualified to judge construction work, to be paid 50% by each the DeColas and Wing. The DeColas did not accept the written proposal.

{¶14} On August 8, 2005, Sky Bank notified the DeColas that it would begin charging extension fees, and, if the DeColas did not authorize the draws, it would be stepping in to take over the project. In a letter dated August 9, 2005, Sky Bank informed the DeColas that, per the Consumer Construction Loan Agreement, section 8, Events of Default, item (f), the nine-month construction phase on the loan expired April 29, 2005. Sky Bank also noted that it had been notified, as of August 29, 2005, the residence had not been completed. The letter stated, "as of September 6, 2005, Sky Bank will take all necessary action" to complete the residence unless "Sky Bank receives written notification prior to September 6th, 2005 that construction is 100% complete per a bank approved inspector, a final Occupancy Permit has been provided by Ashtabula County, and a Satisfactory Completion Certificate has [been] signed by all parties." Sky Bank also notified the DeColas of the following:

{¶15} "If Sky Bank should have to exercise its rights and complete the construction *** Sky Bank will use the funds currently available for disbursement to complete the construction phase. Sky Bank will make any disbursement to Pete Wing [C]ontracting, Inc., (general contractor) for any and all work that has already been completed and inspected, but not yet paid for out of the construction loan. All future draws will be paid to Pete Wing Contracting, Inc. (unless otherwise noted) based on

percentage of completion out of the construction loan until the construction is 100% complete."

{¶16} In an e-mail dated September 28, 2005, Sky Bank notified the DeColas that Wing would receive the final monies in two separate checks: one check upon receipt of the occupancy permit issued by the Ashtabula County Building Department and Wing signing a bank completion certificate, and one check upon completion of the identified "punch list items."

{¶17} The DeColas signed a completion certificate on September 29, 2005, indicating that they were not satisfied with the work.

{¶18} A certificate of occupancy was issued by the Ashtabula County Building Department on October 3, 2005.

{¶19} On June 2, 2007, Mr. DeCola wrote a letter to the Ashtabula County Commissioners indicating that, although the residence passed inspections of the Ashtabula County Building Department, he still had concerns with the residence.

{¶20} On June 25, 2007, the Ashtabula County Building Department inspected the residence. David Smith of the Ashtabula County Building Department forwarded a letter to the DeColas on June 27, 2007, indicating the residence was in violation of four building codes, to wit: the lack of front and rear steps, the interior steps, head clearance of the basement stairs, and an egress window in the fourth bedroom.

{¶21} Wing authored a letter, dated July 11, 2007, to Mr. Smith with respect to each item identified in his June 2007 letter. Wing stated that, per the contract with the DeColas, the front steps were not to be furnished by his company, that he would be willing to meet with the owner to discuss a solution to the head clearance of the

basement stairs and the interior steps, and that the DeColas agreed to delete the window from the fourth bedroom, which would make it an office.

{¶22} On July 17, 2007, Mr. Smith wrote a letter to the DeColas stating that Wing "indicated that he is willing to meet with you and the Building Department to address the issues." The DeColas never scheduled a meeting.

{¶23} At trial, the jury also heard testimony from the DeColas' expert, Mr. Joseph Nyzen. Mr. Nyzen testified to the code in effect at the time the residence was built—the "International residential code for One – and Two-Family Dwellings (IRC)." Mr. Nyzen testified that he did an inspection of the residence and opined that the residence "contains many, many, I call it, plethora of known *** and reported defects and Building Code violations." Mr. Nyzen also opined that "[t]here almost certainly are defects, concealed and otherwise, that have not been observed or discovered yet." For example, he indicated that the residence is exhibiting signs of structural failure; the work completed on the residence is "substandard, shoddy, unworkmanlike, hazardous and lacking in structural integrity"; the blueprints of the home, which were approved by the Ashtabula County Department of Building Regulations, were inadequate for construction; the builder made changes to the approved construction documents, which is a violation of the IRC; and the residence requires "extensive remedial design and construction *** from roof to foundations inside and out." Mr. Nyzen stated that remediations are required and that during those remediations, the residence would be uninhabitable.

{¶24} Wing's expert, Mr. Stanley Koehlinger, testified that he inspected the residence and reviewed the report of Mr. Nyzen. Mr. Koehlinger testified to each item

on Mr. Nyzen's list. Mr. Koehlinger stated that he did not observe sagging in the floor; he did not see any structural defect with any joists; and that the floor was structurally sound. Mr. Koehlinger also opined that the first floor of the residence was "built good and built properly." Mr. Koehlinger did opine that the residence was in need of some remedial actions; however, the items were "fairly simple" to complete and would not require the DeColas to vacate the premises. Mr. Koehlinger testified that it is not unusual for a residence of this complexity to have items that require fixing, stating, "there's always going to be some problems when the contractor's done, but they're basically called punch list items. You go through the house and you find out where the problems are and you correct them."

{¶25} Mr. Thomas Sands, a builder, also testified on behalf of Wing. Mr. Sands testified that the DeColas had contacted him to inspect the residence. Based on that inspection, he noted that most of the issues were "minor cosmetic things." Mr. Sands used the report prepared by Mr. Koehlinger to draft an estimate of the items that required remediation.

{¶26} The DeColas have filed a timely notice of appeal and, as their first assignment of error, allege:

{¶27} "The [trial] court erred, to the prejudice of the DeColas, in the granting of a [directed] verdict to Defendant Sky Bank on all claims."

{¶28} "According to Civ.R. 50(A)(4), a motion for directed verdict should be granted when, after construing the evidence most strongly in favor of the party against whom the motion is directed, 'reasonable minds could come to but one conclusion upon

the evidence submitted and that conclusion is adverse to such party.'" *Groob v. KeyBank*, 108 Ohio St.3d 348, 2006-Ohio-1189, at ¶14.

{¶29} When ruling on a motion for directed verdict, the court must not consider the credibility of the witnesses or the weight of the evidence. *Estate of Cowling v. Estate of Cowling*, 109 Ohio St.3d 276, 2006-Ohio-2418, at ¶31. (Citations omitted.) Thus, as the determination of a motion for directed verdict only concerns questions of law, reviewing courts apply a de novo standard of review. *Groob v. KeyBank*, 108 Ohio St.3d 348, 2006-Ohio-1189, at ¶14. (Citation omitted.)

{¶30} In their complaint, the DeColas allege that Sky Bank "[s]ome time prior to February 7, 2005 *** caused an inspection of [their] home by Richard A. Beck and Associates, Ltd. Defendant Sky Bank has refused to release the results of that report to Plaintiffs." The DeColas further allege that, as a result of this inspection by Mr. Beck, Sky Bank "knew or should have known that the construction of Plaintiffs' home was being done in an improper, unworkmanlike manner that did not meet the minimum requirements of the Ashtabula County Building Code." The DeColas argue that because of the failure to disclose this report to them, "the shoddy workmanlike manner in which their home was being constructed was willful, wanton and in knowing disregard" of their rights. The DeColas prayed for compensatory and punitive damages.

{¶31} On appeal, the DeColas assert that Sky Bank is liable for improperly making the final disbursement to Wing, in violation of R.C. 1311.011(B)(5). The first issue presented for our review is "[w]hether the trial court erred in determining that no reasonable jury could come to the conclusion the defendant Sky Bank was grossly

negligent as required by O.R.C. 1311.011(B)(5) in disbursing the final funds to defendants Peter J. Wing and Pete Wing Contracting Inc."

{¶32} R.C. 1311.011(B)(5) limits a lender's liability for improper disbursements to those instances of gross negligence and fraud, stating:

{¶33} "When making any payment under the home construction contract ***, the lending institution may accept the affidavit of the original contractor required by division (B)(4) of this section and act in reliance upon it, unless it appears to be fraudulent on its face. The lending institution is not financially liable to the owner, part owner, purchaser, lessee, or any other person for any payments, *except for gross negligence or fraud committed by the lending institution in making any payment to the original contractor*." (Emphasis added.)

{¶34} In its brief, Sky Bank maintains that the DeColas did not set forth a claim under R.C. 1311.011(B)(5), nor did the DeColas amend their complaint under Civ.R. 15(B). Sky Bank argues that the only claim pled by the DeColas was "negligence for the alleged retention of its private inspection report."

{¶35} The DeColas, in their reply brief, argue that Sky Bank was put on notice of a claim pursuant to R.C. 1311.011(B)(5), or, in the alternative, they argue that this issue was tried by implied consent. As previously noted, the DeColas failed to plead gross negligence, pursuant to R.C. 1311.011, in their complaint.

{¶36} Civ.R. 15(B) provides, in pertinent part:

{¶37} "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them

to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment. Failure to amend as provided herein does not affect the result of the trial of these issues."

{¶38} Broad interpretation of this rule, as the DeColas suggest, has the potential of putting an opposing party at a significant disadvantage. This court has previously addressed this argument, stating:

{¶39} "When a party has not sought leave to amend the pleadings to conform to the evidence and the parties have not expressly consented to the issues, implied consent 'will not be permitted where it results in substantial prejudice to a party.' *** Factors to be considered in making a determination as to whether the parties impliedly consented to the litigation of a particular issue include: whether the parties recognized that an issue not in the pleadings entered the case; whether the opposing party had the opportunity to adequately address the issue or would offer additional evidence if the case were tried on a different theory; and whether the witnesses were subject to cross-examination on the particular issue." *Margala v. Berezo*, 11th Dist. No. 2003-T-0155, 2005-Ohio-2265, at ¶14. (Citation and internal citations omitted.)

{¶40} The DeColas did not seek leave to amend their pleadings to conform to the evidence. Additionally, Sky Bank did not expressly consent to the litigation of a claim pursuant to R.C. 1311.011(B)(5). As a result, we employ a two-part test to determine if the DeColas should be permitted to argue a claim that was not properly set forth in their pleadings. First, we must address the relevant factors to determine whether this issue was tried by implied consent of Sky Bank; and second, if it was,

whether amendment of the pleadings to allow this claim would result in "substantial prejudice" to Sky Bank.

{¶41} At the conclusion of opening arguments, Sky Bank moved for a directed verdict, observing that the DeColas failed to "sustain the claims made against [Sky Bank]." Sky Bank stated:

{¶42} "Now, specifically, let me address what has been pled. The only count against my client is Count Six. That count, and it names Sky Bank specifically, is for negligence and failure to produce an inspection report from Richard Beck. He has not produced, by way of open, any duty that the Bank would have to disclose this.

{¶43} "***

{¶44} "The second directed verdict would be in advance of what I anticipate to come later, because I believe in Plaintiff's open, he is forming something that has not been pled, and so I would ask for a directed verdict at this point especially.

{¶45} "He appears to be making claims for interference of contract between himself and Mr. Wing that are complying with draws and other allegations made in the opening statement which are not in the Complaint but interfered with their ability to *** leverage. That is a claim that is not pled, but if the Court is entertaining it, I would ask for a directed verdict on that now. There is absolutely no evidence that my client did this. It's not being pled. It shouldn't be in this case.

{¶46} "The only thing pled against my client is simple negligence. And as to that Your Honor, he has not shown we breached the duty, not even in opening statement."

{¶47} It is clear that as early as the opening statement, Sky Bank *specifically objected* to trial of this issue. Therefore, the DeColas cannot argue the issues were

tried "by implied consent." As a result, we need not get to the second prong, i.e. examining whether allowing presentation of this claim would result in "substantial prejudice" to Sky Bank. It is clear, however, that allowing such claim would result in substantial prejudice to Sky Bank.

{¶48} Here, the DeColas sought to add an entirely different claim than what was initially pled. To allow the DeColas to seek recovery on a claim of gross negligence under R.C. 1311.011(B)(5) would be prejudicial to Sky Bank. A review of the trial transcript reveals that Sky Bank had an opportunity to cross-examine the DeColas' witnesses; however, a claim under R.C. 1311.011(B)(5) presents a different theory of liability which may have required Sky Bank to provide expert testimony. Sky Bank did not present any testimony to the claim of gross negligence with respect to releasing a construction draw.

{¶49} Utilizing the above factors, we conclude that Sky Bank clearly did not give implied consent to litigate a claim under R.C. 1311.011(B)(5). The original pleadings did not place Sky Bank on notice that the DeColas were going to present a claim for gross negligence in releasing construction draws. For "notice" pleading to have meaning, the "notice" must be in the pleading, not presented for the first time in opening statements.

{¶50} In granting Sky Bank's motion for directed verdict, the trial court recognized that the only claim pled by the DeColas was negligence. The trial court stated, "[w]ith regard to the claims against the Bank, it is true that the only claim is for negligence[.]" Therefore, we will focus solely on the DeColas' claim of negligence in failing to release the report of Mr. Beck.

{¶51} To establish a claim for negligence, an appellant must prove: "'(1) that appellee owed a duty to appellant; (2) that appellee breached that duty; (3) that appellee's breach of duty directly and proximately caused appellant's injury; and (4) damages.'" *Wike v. Giant Eagle, Inc.*, 11th Dist. No. 2002-P-0049, 2003-Ohio-4034, at ¶14, quoting *Kornowski v. Chester Properties, Inc.* (June 30, 2000), 11th Dist. No. 99-G-2221, 2000 Ohio App. LEXIS 3001, at *7.

{¶52} The sole source of a "duty" in the instant case arose from the execution of the Consumer Construction Loan Agreement for the financing of the construction of the residence. As indicated by the testimony of Ms. Patrick, the DeColas and Sky Bank had a contractual relationship. The loan agreement contains a provision which governs the very issue on appeal. It states:

{¶53} "REPORTS OR SERVICES REQUESTED BY LENDER. Borrower understands that (i) Lender may engage appraisers, construction inspectors, surveyors, attorneys and other consultants with respect to the Loan and the construction of the Residence, (ii) such persons will be employed by and are acting solely in the interest of the Lender, (iii) any reports prepared or services performed by such persons may not be relied upon by Borrower and (iv) Lender shall have no responsibility or liability to Borrower in regard to such reports or services. BORROWER AGREES THAT LENDER'S MAKING OF AN ADVANCE SHALL NOT BE DEEMED TO BE AN APPROVAL BY LENDER OF THE QUALITY OR EXTENT OF THE CONSTRUCTION COMPLETED AT THE TIME OF THE ADVANCE."

{¶54} As unequivocally outlined in the loan agreement, Sky Bank "shall have no responsibility or liability to" the DeColas with regard to any third party report, specifically

the report of Mr. Beck. Because the source of the DeColas' negligence claim is the Consumer Construction Loan Agreement, the DeColas are bound by the language above. The trial court observed that the Consumer Construction Loan Agreement governed the relationship between the DeColas and Sky Bank, stating:

{¶55} "[T]he argument of imposing a duty is probably tenuous, at best. The contract is pretty clear as to what the obligations are, vis-à-vis the Plaintiffs and the Bank. Mr. Wing, of course, is not a party to that contract and only was working for the Plaintiffs as the builder who was going to build the home for which the funds were being borrowed."

{¶56} Although we have found a lack of duty in the instant case, we will address the trial court's ruling with respect to proximate cause. In ruling in favor of Sky Bank's motion for directed verdict, the trial court also observed that there was no evidence adduced at trial that "any action of [Sky Bank] proximately caused or contributed in any way to the damages claimed by the [DeColas]."

{¶57} """Proximate cause is a troublesome phrase. It has a particular meaning in the law but is difficult to define. It has been defined as: 'That which immediately precedes and produces the effect, as distinguished from a remote, mediate, or predisposing cause; that from which the fact might be expected to follow without the concurrence of any unusual circumstances; that without which the accident would not have happened, and from which the injury or a like injury might have been anticipated.'""" *Gay v. O.F. Mossberg & Sons, Inc.*, 11th Dist. No. 2008-P-0006, 2009-Ohio-2954, at ¶128. (Citations omitted.)

{¶58} In the instant case, there was no evidence that Sky Bank's conduct in withholding the report of Mr. Beck was the proximate cause of the damages claimed by the DeColas. As previously stated, Mr. Beck's report observed that "all appeared structurally sound." We agree with the trial court that "there is nothing in that letter that would put a reasonable person on notice of a serious, serious defect." Therefore, the trial court did not err in granting Sky Bank's motion for directed verdict.

{¶59} We further note that in the DeColas' appellate brief, they claim that Sky Bank breached its fiduciary duties in disbursing the fourth draw to Mr. Wing. A review of the record, however, reveals that the DeColas failed to plead a breach of fiduciary duty in their complaint, and, as such, we decline to address this argument on appeal.

{¶60} The DeColas' first assignment of error is without merit.

{¶61} The DeColas' second assignment of error states:

{¶62} "The [trial] court erred, to the prejudice of the DeColas, in the granting of a [directed] verdict to Defendants Peter J. Wing and Pete Wing Contracting on the Consumers Sales Practices Act Claim."

{¶63} The DeColas allege that Wing violated the Ohio Consumer Sales Practice Act ("CSPA") in his "shoddy and unworkmanlike services" and the actions he "took in delaying the construction of the" residence.

{¶64} The CSPA prohibits unfair or deceptive acts and unconscionable acts or practices by suppliers in consumer transactions whether they occur before, during, or after the transaction. R.C. 1345.02(A) and 1345.03(A). The parties do not dispute that the construction of a residence involves a consumer transaction by a supplier regulated by the CSPA.

{¶65} This court must first determine whether the CSPA applies in the instant scenario, whereby the DeColas entered into a contract with Wing for the construction of their residence located at 779 Garrison Road. We answer in the affirmative.

{¶66} In *Colburn v. Baier Realty & Auctioneers*, this court recognized that the CSPA does not apply in a "pure" real estate transaction. 11th Dist. No. 2002-T-0161, 2003-Ohio-6694, at ¶15, citing *Brown v. Liberty Clubs, Inc.* (1989), 45 Ohio St.3d 191, 195. However, in that same case, we further noted that "the CSPA is applicable to the personal property or services portion of a mixed transaction involving both the transfer of personal property or services and the transfer of real property." Id. at ¶15, citing *Brown v. Liberty Clubs, Inc.*, 45 Ohio St.3d 191, syllabus. In so stating, we adhered to the holding of the Supreme Court of Ohio, in *Brown v. Liberty Clubs, Inc.*, supra, at syllabus.

{¶67} "Ohio courts have held that the CSPA applies to contracts to build a home *** because these transactions involve the *purchase of services rather than simply the purchase of real estate*." *DeLutis v. Ashwort Home Builders, Inc.*, 9th Dist. No. 24302, 2009-Ohio-1052, at ¶8.

{¶68} The distinction between buying an existing home and contracting for services for the construction of a new home has been discussed by the Second Appellate District in *Keiber v. Spicer Constr. Co.* (1993), 85 Ohio App.3d 391, 395. Although the facts of *Brown* are not identical to those present in the instant case, the Second Appellate District, in *Keiber*, also relied on *Brown*, supra, in holding the CSPA applicable to those transactions that include a contract to build a residence. Id. at 393-396. As noted by the First Appellate District, the *Keiber* court reasoned that:

{¶69} "(1) [B]uyers of existing homes have the opportunity to inspect their purchase and evaluate the quality of construction goods and services provided, while buyers of construction services have nothing to inspect at the time of purchase and occupy the same position as homeowners buying construction goods and services, who are protected by the CSPA; (2) no substantial difference exists between residential construction and home improvement contracts, which have been held to be protected by the CSPA; and (3) no express authority exists for the exclusion of residential construction from coverage." *Fesman v. Berger* (Dec. 6, 1995), 1st Dist. No. C-940400, 1995 Ohio App. LEXIS 5327, at *10-11, citing *Keiber v. Spicer Constr. Co.*, 85 Ohio App.3d at 392.

{¶70} The *Keiber* court further stated:

{¶71} "Although the [CSPA] has been deemed not to apply to the sale of a pre-existing residence, *** a contract to build a new home is distinguishable; a residential contract, especially when engaged in the design, construction, and sales of multiple dwellings, is a supplier of consumer-oriented services for the purpose of the [CSPA]. Purchasers of one window, or a home-improvement package, or repair services for air-conditioning machinery attached to the buyer's realty, are all considered consumers under Ohio law. The fact that the consumer is also purchasing the land upon which his house will be built would not seem to make either the buyer any less a consumer or the transaction any less a consumer transaction." Id. at 394.

{¶72} Our research also reveals other appellate districts that have held the CSPA applicable in cases such as the one at issue: that is, the construction of a residence. In fact, while other appellate districts have distinguished *Keiber*, supra, no

appellate district has disavowed its holding that the CSPA applies to a contract for the construction of a residence. See, e.g., *Saraf v. Maronda Homes, Inc. of Ohio*, 10th Dist. No. 02AP-461, 2002-Ohio-6741, at ¶41 (applying the CSPA in a consumer transaction involving the construction of a new home); *Inserra v. J.E.M. Building Corp*. (Nov. 22, 2000), 9th Dist. No. 2973-M, 2000 Ohio App. LEXIS 5447; *Fesman v. Berger*, 1995 Ohio App. LEXIS 5327; *Keiber v. Spicer Constr. Co.*, 85 Ohio App.3d at 396 (holding "residential construction contract is a consumer transaction" under the CSPA); and *Yates v. Mason Masters, Inc.*, 11th Dist. No. 2002-L-001, 2002-Ohio-6697, at ¶17.

{¶73} For example, the Ninth Appellate District, in *DeLutis v. Ashwort Home Builders, Inc.*, 2009-Ohio-1052, at ¶6-16, held the CSPA inapplicable to a contract involving the purchase of a new home. The evidence in *DeLutis* revealed that the residence was built and featured in the annual Parade of Homes, sponsored by the Home Builders Association. Id. at ¶2. Thereafter, the buyers contracted with the builders to purchase the *existing* home. Id. (Emphasis added.) The court reasoned that the CSPA is inapplicable to the sale of the *existing* home, but the CSPA "would apply to that portion of their agreement that involved the construction of additional structures and other provision of services by Ashworth." Id. at ¶14. (Emphasis added.) See, also, *Rose v. Zaring Homes, Inc.* (1997), 122 Ohio App.3d 739, 748, where the court found the CSPA inapplicable to a claim alleging a misrepresentation concerning the green space of the real property, not the construction of the home.

{¶74} The "incongruous situation" cited to by the concurring opinion is wholly inappropriate, as it states a position not contemplated by our decision. The only way one could perceive an incongruity in this analysis is either by misconstruing the law

and/or misunderstanding the facts at issue. We cannot ignore legal precedent, and the suggestion in the concurring opinion that following legal precedent somehow equates to "judicial activism" is simply misguided. The contracting of services toward the end of constructing a residence is within the CSPA; however, the purchase of an *existing* residence is outside the scope of the CSPA. The latter scenario is not applicable to the case before us. Any attempt to claim otherwise is a deliberate obfuscation of the undisputed record in this case.

{¶75} Our decision that the CSPA is applicable to the instant scenario is consistent with the holding of the Supreme Court of Ohio in *Brown v. Liberty Clubs, Inc*, 45 Ohio St.3d 191, syllabus, our previous decision in *Colburn v. Baier Realty & Auctioneers*, 2003-Ohio-6694, at ¶15, as well as the decisions in our sister appellate districts. We therefore agree with the parties that the contract entered into between Wing and the DeColas was a consumer transaction under the CSPA.

{¶76} Unfair or deceptive acts or practices are prohibited by R.C. 1345.02. In order to ascertain whether an act violates R.C. 1345.02(A), one must look to three sources. R.C. 1345.02(B) enumerates practices which are deceptive and unfair. Furthermore, as outlined in R.C. 1345.05(B)(2), the attorney general is authorized to "adopt *** substantive rules defining with reasonable specificity acts or practices that violate sections 1345.02, 1345.03, and 1345.031 of the Revised Code"; these rules are found in the Ohio Administrative Code. The courts of Ohio have also defined acts and practices considered to be deceptive and unfair. See, e.g., *Frey v. Vin Devers, Inc.* (1992), 80 Ohio App.3d 1, 6; *Fletcher v. Don Foss of Cleveland, Inc.* (1993), 90 Ohio App.3d 82, 86.

{¶77} In their complaint, the DeColas allege that the "acts and practices of [Wing] are unconscionable consumer sales practice[s] pursuant to [R.C.] 1345.03." "In order to recover for unconscionable acts or practices, the consumer must prove that the supplier acted unconscionably and knowingly." *Keeton v. Hinkle* (Mar. 10, 2000), 5th Dist. No. CA 871, 2000 Ohio App. LEXIS 980, at *12. (Citation omitted.) Furthermore, R.C. 1345.03(B) outlines the factors to be taken into consideration when determining whether an act or practice is unconscionable, stating:

{¶78} "(1) Whether the supplier has knowingly taken advantage of the inability of the consumer reasonably to protect the consumer's interests because of the consumer's physical or mental infirmities, ignorance, illiteracy, or inability to understand the language of an agreement;

{¶79} "(2) Whether the supplier knew at the time the consumer transaction was entered into that the price was substantially in excess of the price at which similar property or services were readily obtainable in similar consumer transactions by like consumers;

{¶80} "(3) Whether the supplier knew at the time the consumer transaction was entered into of the inability of the consumer to receive a substantial benefit from the subject of the consumer transaction;

{¶81} "(4) Whether the supplier knew at the time the consumer transaction was entered into that there was no reasonable probability of payment of the obligation in full by the consumer;

{¶82} "(5) Whether the supplier required the consumer to enter into a consumer transaction on terms the supplier knew were substantially one-sided in favor of the supplier;

{¶83} "(6) Whether the supplier knowingly made a misleading statement of opinion on which the consumer was likely to rely to the consumer's detriment;

{¶84} "(7) Whether the supplier has, without justification, refused to make a refund in cash or by check for a returned item that was purchased with cash or by check, unless the supplier had conspicuously posted in the establishment at the time of the sale a sign stating the supplier's refund policy."

{¶85} The evidence in this case does not demonstrate any unfair, deceptive, or unconscionable act on the part of Wing. Although the DeColas have argued that Wing failed to complete the residence within the allotted time period, under the facts of this case, that failure does not fit any of the aforementioned criteria. The evidence at trial demonstrated that Wing attempted to rectify the situation by hiring a neutral, third party who was qualified to judge construction work to mediate their differences. In fact, Wing was willing to split the cost with the DeColas.

{¶86} The DeColas also allege that Wing's "shoddy and unworkmanlike services" constituted a violation of the CSPA. The evidence demonstrates otherwise. The DeColas did not point to a specific act or practice that was deceptive, which violated R.C. 1345.02 or 1345.03. In this case, there were numerous experts testifying as to the quality of workmanship. Although the quality of workmanship may not have been to the DeColas' standard, it certainly was not "deceptive or misleading." See, *Yates v. Mason Masters*, *Inc.*, 2002-Ohio-6697, at ¶19. As observed by the trial court:

{¶87} "[I]n this case there are differing opinions about whether the quality of work is up to and acceptable to industry standard. *** [Y]ou can always find differing opinions about the quality of work. Quality of work, by itself, doesn't necessarily indicate a violation of the Consumer Sales Practice Act."

{¶88} We further recognize that even in cases where workmanship was found less than satisfactory, courts found that it was not so poor as to be unconscionable, and did not find that the CSPA had been violated. *Yates v. Mason Masters*, *Inc.*, 2002-Ohio-6697, at ¶19 and *Keeton v. Hinkle*, 2000 Ohio App. LEXIS 980 at *12.

{¶89} Based on the foregoing, the DeColas' second assignment of error is without merit.

{¶90} The DeColas' third assignment of error states:

{¶91} "The jury's verdict in favor of Defendants Peter J. Wing and Pete Wing Contracting, Inc. was against the manifest weight of the evidence."

{¶92} The jury returned its answers to the interrogatories and a general verdict in favor of Wing. The interrogatories found:

{¶93} "1. That the defendants, Pete Wing Contracting, Inc. and Peter J. Wing, did not breach the contract with the plaintiffs.

{¶94} "2. That the defendants, Pete Wing Contracting, Inc. and Peter J. Wing, did not fail to perform the work on the plaintiffs' home in a competent, satisfactory and workmanlike manner."

{¶95} The civil manifest weight of the evidence standard is: "[j]udgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight

of the evidence." *C. E. Morris Co. v. Foley Construction Co*. (1978), 54 Ohio St.2d 279, syllabus. "'We must indulge every reasonable presumption in favor of the lower court's judgment and finding of facts. *Seasons Co. v. Cleveland* (1984), 10 Ohio St.3d 77 ***. In the event the evidence is susceptible to more than one interpretation, we must construe it consistently with the lower court's judgment. See *Ross v. Ross* (1980), 64 Ohio St.2d 203 ***.'" *In re S.Y.*, 11th Dist. No. 2008-A-0023, 2008-Ohio-4512, at ¶20. (Parallel citations and citation omitted).

{¶96} After the presentation of evidence, the trial court instructed the jury with respect to the interrogatories, stating, in pertinent part:

{¶97} "In a contract to perform construction, the law imposes upon builders and contractors the duty to perform such services in a workmanlike manner, and a failure to do so is a breach of contract.

{¶98} "Workmanlike manner is the customary way of doing the work in the community where the work is to be performed. The test of workmanship is not what either party individually expects or would like. It is a performance of the work equal to that customarily done by others in the same trade, in the same community, for the same type of work.

{¶99} "If you find that the Defendant substantially performed his part of the contract with only slight deviations, omissions or defects, then he did not breach the contract."

{¶100} The jury trial in the instant matter spanned five days. The jury heard testimony from numerous experts, Mr. Wing, and the DeColas with respect to the events which occurred over a 14-month time period. The trial consisted of

approximately 100 exhibits, which included the blueprints of the residence, inspection reports, and numerous e-mails between the DeColas and Wing. In fact, Mr. DeCola testified that over this time period, "about 1,700" e-mails were sent to both Sky Bank and Wing.

{¶101} Further, the jury heard testimony from Mr. Koehlinger who rebutted the report of Mr. Nyzen and stated the residence did not have structural defects. Mr. Koehlinger stated he has "never seen" a "perfect house" built and that "there's always going to be some problems when the contractor's done, but they're basically called punch list items." Mr. Koehlinger also stated the remedial actions required to fix any problems at the residence were "fairly simple." Mr. Sands, a builder who has experience in Ashtabula County, testified that most of the issues were "minor cosmetic things."

{¶102} The jury also heard the testimony of Mr. Smith regarding the inspection of the residence in June 2007 and the letter he authored regarding the four violations of the residence. However, there was also evidence adduced at trial that the contract did not call for front steps, that the DeColas agreed to omit a window in the fourth bedroom, and that Wing was willing to meet with the DeColas and Mr. Smith to rectify the other two violations.

{¶103} Therefore, based on the evidence presented, the record establishes there was competent, credible evidence upon which the jury relied in reaching its conclusion that Wing did not breach the contract with the DeColas nor fail to perform the work on the residence in a competent, satisfactory, and workmanlike manner.

{¶104} For the reasons stated in the opinion of this court, the DeColas' assignments of error are without merit. It is the order of this court that the judgment of the Ashtabula County Court of Common Pleas is hereby affirmed.

MARY JANE TRAPP, P.J., concurs,

DIANE V. GRENDELL, J., concurs in judgment only with a Concurring Opinion.

DIANE V. GRENDELL, J., concurs in judgment only with a Concurring Opinion.

{¶105} I concur in the judgment ultimately reached by the majority; however, the residential real estate construction contract in the instant case was outside the scope of the CSPA. Therefore, I respectfully disagree with the majority's conclusion that the CSPA is applicable.

{¶106} This court has previously held that, "[u]nder Ohio law, the CSPA is not applicable to pure real estate transactions." *Colburn v. Baier Realty & Auctioneers*, 11th Dist. No. 2002-T-0161, 2003-Ohio-6694, at ¶15, citing *Brown v. Liberty Clubs, Inc.* (1989), 45 Ohio St.3d 191, 193; *Hurst v. Ent. Title Agency Inc.*, 157 Ohio App.3d 133, 2004-Ohio-2307, at ¶34 ("[a] collateral service solely associated with the sale of real estate is a pure real estate transaction").

{¶107} Further, "[r]eal estate is not a 'consumer transaction' because it does not fall within the definition of a good, service, franchise, or intangible as provided by the statute." *Colburn*, 2003-Ohio-6694, at ¶15 (citation omitted). The CSPA evidences the clear intention of the General Assembly to exclude real estate from the Act. See *Shore*

W. Constr. Co. v. Sroka (1991), 61 Ohio St.3d 45, 48; see also *Rose v. Zaring Homes, Inc*. (1997), 122 Ohio App.3d 739, 746 (the court held that the CSPA was inapplicable to a developer's sale of a real estate lot to purchasers for the construction of a new house because that did not constitute a consumer transaction within the CSPA).

{¶108} The majority joins those Ohio appellate jurisdictions that have applied a judicial activist approach to the CSPA in residential real estate construction cases. However, extending the CSPA to new home construction based on the Ohio Supreme Court decision in *Brown v. Liberty Clubs, Inc.*, 45 Ohio St.3d 191, which involved fraudulent sales literature and steak knives in connection with the sale of campsite lots, is an expansive interpretation of the CSPA without merit. If the Ohio General Assembly intended new home sales to be subject to the CSPA, the General Assembly would not have excluded real estate sales from its purview. See *Skora*, 61 Ohio St.3d at 48 ("[t]he absence of such language strongly indicates that the General Assembly did not intend to exclude loans involving real estate from the definition of consumer loan").

{¶109} The Ohio Legislature did not make a statutory distinction between "pure" real estate transactions and less than "pure" real estate sales in the CSPA. The Legislature also did not statutorily specify that residential real estate construction contracts were excluded from the real estate exclusion in the CSPA. This court should not judicially write such an exclusion into the CSPA.

{¶110} The majority's approach also leads to the incongruous situation where the initial sale of a newly constructed home is subject to the CSPA, but the resale of that same home by the initial buyer is not subject to the CSPA because of the real estate exclusion in the statute. Describing the latter real estate transaction as more "pure"

than the original real estate sale is a distinction without legal merit that this judge is not willing to make.

{¶111} Accordingly, since the DeColas' CSPA claim did not involve a "consumer transaction", as defined by R.C. 1345.01(A), the trial court did not err in granting the directed verdict.