**[Cite as *Durant-Baker v. Secor Funeral Home,* 2010-Ohio-4208.]**

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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| | | JUDGES: |
| MARIA DURANT-BAKER, ET AL | : | Hon. W. Scott Gwin, P.J. |
| | : | Hon. William B. Hoffman, J. |
| Plaintiffs-Appellants | : | Hon. Sheila G. Farmer, J. |
| | : | |
| -vs- | : | |
| | : | Case No. 2009-CA-0127 |
| SECOR FUNERAL HOME, ET AL | : | |
| | : | |
| Defendants-Appellees | : | O P I N I O N |

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| CHARACTER OF PROCEEDING: | Civil appeal from the Richland County Court of Common Pleas, Case No. 2008CV1148 |
| JUDGMENT: | Affirmed |
| DATE OF JUDGMENT ENTRY: | September 3, 2010 |

APPEARANCES:

| For Plaintiffs-Appellants | For Defendants-Appellees |
|---|---|
| DONALD GALLICK<br>190 North Union Street #201<br>Akron, OH 44304 | AMY FULMER<br>5910 Venture Drive, Suite B<br>Dublin, OH 43017 |

*Gwin, P.J.*

**{¶1}** Plaintiff-appellant Maria Durant-Baker appeals a summary judgment of the Court of Common Pleas of Richland County, Ohio, entered in favor of Secor Funeral Home and Matthew Schwab, the funeral director for Secor Funeral Home. Appellant assigns two errors to the trial court:

**{¶2}** "I. THE TRIAL COURT ERRED WHEN IT FOUND THAT PLAINTIFFS PRESENTED NO EVIDENCE OF A VIOLATION OF OHIO'S CONSUMER SALES PRACTICES ACT AND GRANTED SUMMARY JUDGMENT ON THE CLAIM.

**{¶3}** "II THE TRIAL COURT ABUSED ITS DISCRETION BY STRIKING PLAINTIFF'S EXPERT WITNESS BECAUSE IT FAILED TO IMPOSE THE LEAST SEVERE SANCTION, AND UNFAIRLY PREJUDICED THE CLAIMS FOR EMOTIONAL DISTRESS."

**{¶4}** Appellants' complaint asserted claims for abuse and mishandling of a corpse, violation of the Ohio Consumer's Sales Practices Act, negligent infliction of emotional distress, and fraud. They also claimed respondeat superior against appellee Schwab and prayed for punitive damages. Appellants' appeal addresses only the Consumer Sales Practices Act and negligent infliction of emotional distress.

**{¶5}** The trial court found appellant had not presented any evidence of an unfair or deceptive act or practice. The court found appellant admitted that neither appellee had made a representation upon which she relied, and admitted neither appellee made any false representation. The court found appellant had failed to present any testimony from an expert or third party as to the emotional distress she suffered and did not allege she sought professional treatment for emotional distress.

**{¶6}** The trial court did not recite any facts it found to be material and undisputed. It appears from the record appellant's daughter, Loraine Barker, died at the Ohio State Medical Center. Appellant contacted appellee Secor for information regarding funeral services. While appellant and appellees met, the Ohio State Medical Center Morgue telephoned and advised that Ms. Barker's body was ready for release. Appellee informed appellant the body would be moved from the morgue to a funeral home in Columbus for embalming. During the meeting between appellant and appellees, there was a discussion about Ms. Barker's need for an oversized casket and burial vault. Appellees did not have the items, but agreed to attempt to locate them.

**{¶7}** In his deposition, Appellee Schwab testified appellant and her brother indicated they wanted to discuss the matter with other family members regarding how to pay for the funeral, particularly in light of the fact a larger casket and vault would be more expensive than a standard size. Appellee testified the meeting lasted about 10 minutes. Appellee did not provide the parties with a price list, but informed appellant how much a typical casket and vault would cost, and indicated there were various options with various prices. Appellee did not discuss specific services and gave estimated prices for different services. Appellee's funerals are "packaged" and appellees do not have separate prices for various items.

**{¶8}** The morgue had released Ms. Barker's body for transfer to the embalmer's facility without a signed release. Ultimately, appellant chose to use a different funeral home, which also used the same embalmer. Appellant alleges there was a period of approximately 2 ½ to 4 hours during which she was unaware of where her daughter's body was.

I

**{¶9}** Civ. R. 56 states in pertinent part:

**{¶10}** "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

**{¶11}** A trial court should not enter a summary judgment if it appears a material fact is genuinely disputed, nor if, construing the allegations most favorably towards the non-moving party, reasonable minds could draw different conclusions from the undisputed facts, *Houndshell v. American States Insurance Company* (1981), 67 Ohio St. 2d 427. The court may not resolve ambiguities in the evidence presented, *Inland Refuse Transfer Company v. Browning-Ferris Industries of Ohio, Inc.* (1984), 15 Ohio St. 3d 321. A fact is material if it affects the outcome of the case under the applicable substantive law, *Russell v. Interim Personnel, Inc.* (1999), 135 Ohio App. 3d 301.

**{¶12}** When reviewing a trial court's decision to grant summary judgment, an appellate court applies the same standard used by the trial court, *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St. 3d 35. This means we review the matter de novo, *Doe v. Shaffer,* 90 Ohio St.3d 388, 2000-Ohio-186.

**{¶13}** The party moving for summary judgment bears the initial burden of informing the trial court of the basis of the motion and identifying the portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the non-moving party's claim, *Drescher v. Burt* (1996), 75 Ohio St. 3d 280. Once the moving party meets its initial burden, the burden shifts to the non-moving party to set forth specific facts demonstrating a genuine issue of material fact does exist, Id. The non-moving party may not rest upon the allegations and denials in the pleadings, but instead must submit some evidentiary material showing a genuine dispute over material facts, *Henkle v. Henkle* (1991), 75 Ohio App. 3d 732.

**{¶14}** In her deposition, Appellant admitted appellee Schwab told her he could not give a price quote until he found out what size casket would be needed and how much it would cost. Early in the meeting, appellant determined she would not be using appellees' services because she would have to pay in advance. Appellant testified she had not contracted with appellees to do anything.

**{¶15}** R.C.1345.01 (A) defines the term consumer transaction as "a sale *** or transfer of an item of goods *** to an individual for purposes that are primarily personal, family, or household." R.C. 1345.01 (C) defines "supplier" as "a seller, lessor, assignor, franchisor, or other person engaged in the business of effecting or soliciting consumer transactions, whether or not the person deals directly with the consumer." R.C. 1345.01

(D) defines a consumer as a person who engages in a consumer transaction with a supplier. R.C. 1345.02 (A) prohibits the supplier from committing and unfair or deceptive act or practice before, during, or after a consumer transaction.

**{¶16}** Case law dictates that under the Consumer Sales Practices Act it is not necessary for a sale to actually take place for a supplier to be held liable to a consumer for a deceptive act. Solicitation to sell goods may be sufficient to give rise to liability even without a sale if the deceptive act is committed in connection with the solicitation. *Weaver v. J.C. Penney Company* (1977), 53 Ohio App. 2d 165, 372 N.E. 2d 633. Negotiation can constitute solicitation even if a sale is never consummated. *McDonald v. Bedford Dodson* (1989), 59 Ohio App. 3d 38, 570 N.E. 2d 299.

**{¶17}** Appellant argues appellees never provided her with a general price list, which constitutes a violation of the Consumer Sales Practices Act. Appellant's complaint does not allege failure to provide a general price list, but rather, alleges appellees were not authorized to transfer Ms. Barker's body from the morgue to the embalming facility.

**{¶18}** Appellees point out they had no a price list for oversized caskets and vaults such as the one Ms. Barker required. Therefore, even if appellees had provided their standard price list, it would not have contained any information appellant needed. Appellant understood at the time she spoke with appellees, appellees did not know the price of the casket and vault. Further, appellant never intended to utilize appellees' services and did not enter into a contract or transaction with appellees.

**{¶19}** We agree with the trial court appellees did not make any false or misleading representations, and appellant did not present any evidence of an unfair or deceptive act or practice.

**{¶20}** The first assignment of error is overruled.

II.

**{¶21}** In her second assignment of error, appellant alleges the trial court erred in striking her expert witness because of a delay in filing a notice of expert witness by the October 28, 2008 deadline. Appellant alleges the loss of an expert witness essentially eviscerated her claims of infliction of emotional distress.

**{¶22}** Appellant argues the court should have imposed a less severe sanction for her missed deadline, short of prohibiting the witness from testifying, particularly in light of the fact the court found she had failed to present any expert testimony.

**{¶23}** The record does not indicate appellant ever offered any evidence from her expert witness but only identified who her witness would be. Appellees moved to strike the expert witness on July 17, 2009. The trial court scheduled a non-oral hearing on the motion on July 23, 2009. The docket does not reflect the court ever actually ruled on the motion. Appellant's argument the court struck her expert witness is not borne out by the record. The expert never furnished any opinion regarding appellants' damages, as the court correctly found.

**{¶24}** The second assignment of error is overruled.

**{¶25}** For the foregoing reasons, the judgment of the Court of Common Pleas of Richland County, Ohio, is affirmed.

Gwin, P.J.,

Hoffman, J., and

Farmer, J., concur

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HON. W. SCOTT GWIN

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HON. WILLIAM B. HOFFMAN

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HON. SHEILA G. FARMER

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| Defendants-Appellees | : | CASE NO. 2009-CA-0127 |

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Richland County, Ohio, is affirmed. Costs to appellants

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HON. W. SCOTT GWIN

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HON. WILLIAM B. HOFFMAN

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HON. SHEILA G. FARMER