

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLERMONT COUNTY

LINDSEY A. NELSON, et al.,	:	
Plaintiffs-Appellants,	:	CASE NO. CA2011-02-011
	:	<u>OPINION</u>
- vs -	:	6/11/2012
	:	
JOHN PIERATT d.b.a. JOHN PIERATT HOMES, et al.,	:	
Defendants-Appellees.	:	

CIVIL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2008 CVH 00833

Mark F. Smith, George P. Brandenburg, 905 Ohio Pike, Cincinnati, Ohio 45245, for plaintiffs-appellants

Thomas G. Eagle, 3386 North State Route 123, Lebanon, Ohio 45036, for defendants-appellees

PIPER, J.

{¶ 1} Plaintiffs-appellants, Lindsey and Anne Nelson, appeal a decision of the Clermont County Court of Common Pleas denying their request for treble damages in an action brought under the Ohio Consumer Sales Practices Act (CSPA).

{¶ 2} In 2006, the Nelsons entered into a contract with defendant-appellee, John

Pieratt d.b.a. John Pieratt Homes (Pieratt), for the construction of a house in New Richmond, Ohio. The Nelsons moved into the house in 2007. In April 2008, the Nelsons filed a complaint against Pieratt for breach of contract, negligence, and violations of the CSPA. They later filed an amended complaint adding defendants-appellees, Sheryl Pieratt (John Pieratt's wife) and Whitehall Homes LLC, and asserting three additional causes of action. The matter proceeded to a jury trial. On July 1, 2010, the jury found in favor of the Nelsons on their claims for breach of contract and for violations of the CSPA.

{¶ 3} Specifically, based on interrogatories it answered, the jury found that Pieratt "materially breached the contract" and awarded the Nelsons \$60,000 for the breach of contract. The jury also found that Pieratt violated the CSPA when he committed unfair or deceptive acts by (1) representing that the work performed by the defendants in constructing the Nelsons' residence had been supplied in accordance with a previous representation when, in fact, it had not; (2) failing to complete the work as required under the contract; (3) failing to correct defects in the materials and workmanship of the defendants or subcontractors within a one-year period as expressly warranted in the contract; (4) failing to perform the work under the contract in a good and workmanlike manner; and (5) committing other unfair or deceptive acts or practices, namely: assigning the contract to Whitehall Homes, applying a "cost-plus" billing without the Nelsons' knowledge, and failing to provide an accurate accounting.¹ Upon finding that Pieratt committed the last three unfair or deceptive acts knowingly, the jury awarded the Nelsons \$20,100 for these CSPA violations. The jury did not award damages for the other four CSPA violations.

{¶ 4} The Nelsons filed a request for treble damages pursuant to R.C. 1345.09(B). On September 24, 2010, the trial court denied the Nelsons' request for treble damages. The

1. These last three unfair or deceptive acts will be referred to in the opinion as the three CSPA violations.

trial court found it could not award treble damages for the first four CSPA violations because the jury did not award damages for these violations. The trial court, however, awarded the Nelsons \$800 for these violations (\$200 per act) as permitted under R.C. 1345.09(B). The trial court also found it could not award treble damages for the last three CSPA violations because, even though the jury awarded \$20,100 in damages for these violations, the Nelsons failed to meet the requirements of R.C. 1345.09(B).

{¶ 5} The Nelsons appeal, raising one assignment of error:

{¶ 6} THE TRIAL COURT ERRED BY NOT AWARDING THE APPELLANTS TREBLE DAMAGES FOR APPELLEES VIOLATION OF OHIO REVISED CODE §1345 ET SEQ. (THE "CONSUMER SALES PRACTICES ACT" OR "CSPA"). [sic]

{¶ 7} The Nelsons argue that given the jury's finding that Pieratt breached the contract and committed several CSPA violations, they are entitled under R.C. 1345.09(B) to recover three times the amount of damages awarded for the breach of contract (i.e., 3 x \$60,000). The Nelsons also assert that the trial court erred by not awarding treble damages for the CSPA violations. At the heart of the Nelsons' argument is their claim that Pieratt's breach of contract was an unfair or deceptive act in violation of the CSPA, thus entitling them to treble damages.

{¶ 8} The CSPA "prohibits unfair or deceptive acts or practices and unconscionable acts or practices by suppliers in consumer transactions." *Einhorn v. Ford Motor Co.*, 48 Ohio St.3d 27, 29 (1990). A consumer who has been the victim of unfair or deceptive acts or practices may choose between rescinding the transaction or seeking actual economic damages. R.C. 1345.09(A). In some cases, the damage award may be trebled. Specifically, under R.C. 1345.09(B), a consumer may recover "three times the amount of the consumer's actual economic damages or [\$200], whichever is greater," where

the violation was an act or practice to be declared 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[.]

R.C. 1345.09(B).

{¶ 9} In other words, for treble damages to be awarded under R.C. 1345.09(B), (1) the act or practice must have been declared to be deceptive or unconscionable by a regulation promulgated by the Attorney General, or (2) an Ohio court must have previously determined that the act or practice violated R.C. 1345.02, 1345.03, or 1345.031 and that court decision must have been made available for public inspection. *White v. Hornbeck*, 9th Dist. No. 01CA0057, 2002-Ohio-3037, ¶ 8.

{¶ 10} When a plaintiff has elected to seek actual damages and has met the requirements for treble damages under R.C. 1345.09(B), "the statute does not make it discretionary for a trial court to award either actual damages or treble damages." *Stultz v. Artistic Pools, Inc.*, 9th Dist. No. C.A. 20189, 2001 WL 1219473, *3 (Oct. 10, 2001), quoting *Armstrong v. Kittinger*, 9th Dist. Nos. 16124 and 16378, 1994 WL 510542, *10 (Sept. 21, 1994).

{¶ 11} The Nelsons assert that the jury's finding that Pieratt breached his contract with them and committed several unfair or deceptive acts in violation of the CSPA compels the conclusion that Pieratt's breach of contract is also an unfair or deceptive act in violation of the CSPA, thus entitling them to treble damages. We disagree.

{¶ 12} "Although there have been circumstances where a breach of contract or a breach of warranty has constituted a violation of the OCSPA, not every such breach will constitute an OCSPA violation. Indeed, a breach of contract is not necessarily rooted in a

deceptive act pursuant to R.C. 1345.02." *Wasserman v. Home Corp.*, 8th Dist. No. 90915, 2008-Ohio-5477, ¶ 13. "Obviously, a contract can be breached in myriad ways that do not involve deception." *Toth v. Spitzer*, 2nd Dist. No. 17178, 1998 WL 879475, *2 (Dec. 18, 1998). "A violation of the CSPA does not depend on any contractual or quasi-contractual claims; rather, it is a separate cause of action and legal claim." *Hudson-Wobbecke Ents., Inc. v. Burwell*, 5th Dist. Nos. 06-CA-58 and 06-CA-50, 2007-Ohio-1728, ¶ 38.

{¶ 13} As an appellate judge stated, "Despite its clearly pro-consumer stance, the [CSPA] was not intended to encompass all aspects or breaches of consumer sales agreements[.]" *Lump v. Best Door and Window, Inc.*, 3d Dist. No. 8-01-09, 2002 WL 462863, *9 (Mar. 27, 2002) (Walters, J., concurring). The mere fact that a party has breached a contract or violated a warranty does not give rise to a CSPA claim in the absence of indicia of unfair or deceptive practices associated therewith. *Id.* at *11 (Walters, J., concurring).

{¶ 14} While some Ohio courts have held that a breach of contract is an unfair or deceptive act in violation of the CSPA, these decisions are not applicable to the case at bar. Their holdings were all specifically premised on a finding that the breach of contract was *knowing*. See *Teeters Constr. v. Dort*, 142 Ohio Misc.2d 1, 2006-Ohio-7254 (M.C.) (finding that a knowing breach of contract constituted a violation of the CSPA); *Zimmerman v. U.S. Diamond & Gold Jewelers, Inc.*, 2d Dist. No. 14680, 1995 WL 100820 (Mar. 8, 1995) (trial court finding that a knowing breach of contract constituted a violation of the CSPA); *Lucia v. West Hills Auto and Truck Center, Inc.*, Hamilton C.P. No. A0401606, 2005 WL 3875895 (July 19, 2005) (finding that a knowing breach of contract constituted a deceptive act in violation of the CSPA); and *Brown v. Spears*, Franklin M.C. No. 8897, 1979 WL 52451 (Aug. 20, 1979) (finding that the intentional breach of a contract constituted an unfair or deceptive act in violation of the CSPA).

{¶ 15} In the case at bar, a review of the jury's answers to the interrogatories in their

entirety plainly shows that the jury found that Pieratt "*materially* breached" his contract with the Nelsons. In either its verdict or interrogatories, the jury never found that Pieratt knowingly breached the contract, nor did the jury find that Pieratt's breach of contract was an unfair or deceptive act in violation of the CSPA. By contrast, the jury specifically found that Pieratt violated the CSPA in seven separate instances and that three of these CSPA violations were committed knowingly. We also note that the Nelsons did not file a transcript of the jury trial. As a result, we have no way of determining on what grounds the jury found Pieratt breached his contract with the Nelsons, or whether the breach of contract and the seven CSPA violations were related.

{¶ 16} In light of the foregoing, the Nelsons are not entitled to treble damages for the breach of contract and the trial court did not err in not trebling the \$60,000 in damages awarded to the Nelsons for the breach of contract.

{¶ 17} We further find that the trial court did not err in not trebling the \$20,100 in damages awarded to the Nelsons for the CSPA violations. As stated earlier, the jury awarded the Nelsons \$20,100 in damages for the CSPA violations but only for three of the seven CSPA violations (namely, assigning the contract to Whitehall Homes, applying a "cost-plus" billing without the Nelsons' knowledge, and failing to provide an accurate accounting). The jury did not award any damages for the other four CSPA violations.

{¶ 18} R.C. 1345.09(B) clearly provides that a consumer is entitled to "three times the amount of the consumer's *actual* economic damages or two hundred dollars, whichever is greater[.]" (Emphasis added.) "It is axiomatic that to award treble damages based upon actual damages, a finding of actual damages must be first made." *Baker v. Tri-County Harley Davidson, Inc.*, 12th Dist. No. CA98-12-250, 1999 WL 1037262, *3 (Nov. 15, 1999).

{¶ 19} Because the jury did not award any damages for four of the CSPA violations, the trial court did not err in not awarding treble damages for these four violations. However,

under R.C. 1345.09(B), statutory damages of \$200 are recoverable in the absence of actual economic damages. Thus, the trial court properly awarded \$800 to the Nelsons for these violations (\$200 per violation) as the Nelsons met the requirements of R.C. 1345.09(B).

{¶ 20} Likewise, although the Nelsons were awarded \$20,100 in damages for the other three CSPA violations, the trial court did not err in not trebling those damages. In order to receive treble damages, a plaintiff must meet the requirements of R.C. 1345.09(B). *Bodenberg v. Duggan Homes, Inc.*, 2d Dist. No. 20311, 2004-Ohio-5935. That is, the plaintiff must either show that the act or practice was declared to be deceptive or unconscionable by a regulation promulgated by the Attorney General, or that an Ohio court previously determined that the act or practice violated R.C. 1345.02, 1345.03, or 1345.031 and that court decision was made available for public inspection. R.C. 1345.09(B); *Hornbeck*, 2002-Ohio-3037 at ¶ 8.

{¶ 21} We agree with the trial court that the Nelsons did not meet the requirements of R.C. 1345.09(B) with regard to the three CSPA violations. Specifically, a review of the record plainly shows that:

The [Nelsons] have failed to provide any evidence that these three acts have been declared deceptive by the Attorney General or in any court decision made available for public inspection pursuant to R.C. 1345.05(A)(3) and it is the plaintiffs' burden to submit such support for its request for treble damages.

The language of R.C. 1345.09(B) is specific that, in order for economic damages to be trebled, the violation must be declared to be deceptive by the Attorney General or a court decision made available for public inspection. The only three acts declared by the jury to be unfair or deceptive for which economic damages were also awarded have not been declared deceptive by the Attorney General nor has the plaintiff provided any case law made available for public inspection which declares said acts to be deceptive. As a result, the court cannot award treble damages.

{¶ 22} It follows the trial court did not err in not trebling the \$20,100 in damages

awarded to the Nelsons for the three CSPA violations.

{¶ 23} The Nelsons' assignment of error is overruled.

{¶ 24} Judgment affirmed.

POWELL, P.J., and HENDRICKSON, J., concur.