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# IN THE COURT OF COMMON PLEAS
# CUYAHOGA COUNTY, OHIO

DELENE EVERT
Plaintiff

GANLEY WESTSIDE IMPORTS, INC., ET AL
Defendant

Case No: CV-06-604927

Judge: EILEEN T GALLAGHER

## JOURNAL ENTRY

82 ARBIT.DECREE - FINAL

ARBITRATION CONFIRMATION HEARING CALLED AND COUNSEL FOR BOTH PARTIES PRESENT. ARBITRATION AWARD FOR MONETARY DAMAGES, DECLARATORY AND INJUNCTIVE RELIEF IS CONFIRMED. MONETARY AWARD IN THE AMOUNT OF $40,119.95 HAS BEEN SATISFIED. COSTS ASSESSED TO DEFENDANT. COURT COST ASSESSED TO THE DEFENDANT(S).

Eileen T Gallagher

Judge Signature 08/18/2008



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08/13/2008

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IN THE COMMON PLEAS COURT
CUYAHOGA COUNTY, OHIO

| | | |
|---|---|---|
| Delene Evert | ) | CASE NO. CV 06 604927 |
| | ) | |
| Plaintiff | ) | JUDGE: Eileen T. Gallagher |
| | ) | |
| -vs- | ) | |
| | ) | Motion to Reinstate and Confirm |
| Ganley Westside Imports, Inc., et al. | ) | Arbitration Award |
| | ) | |
| Defendants | ) | |
| | ) | |

Now comes Plaintiff Delene Evert, by and through undersigned counsel, and hereby respectfully requests that this Honorable Court reinstate this case and confirm the arbitration award in her favor, pursuant to RC 2711.09. On June 26, 2008, an arbitration award was rendered on behalf of Plaintiff Delene Evert against Defendant Ganley Westside Imports, Inc. A copy of the award is attached hereto as Exhibit A.

Respectfully Submitted,

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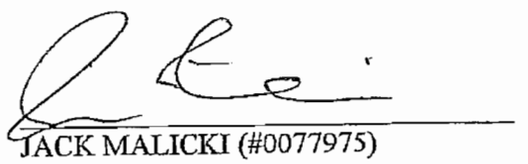
**CERTIFICATE OF SERVICE**

A copy of the foregoing was sent by ordinary U.S. mail this 3rd day of July, 2008, to the following:

Russell W. Harris, Esq.
13215 Detroit Avenue
Lakewood, OH 44107



JACK MALICKI (#0077975)
Attorney for Plaintiff

# AMERICAN ARBITRATION ASSOCIATION
**Commercial Arbitration Tribunal**

In the Matter of the Arbitration between

Re: 53 188 00041 07
Delene Evert
and
Ganley Westside Imports, Inc.
and
Tony Devito

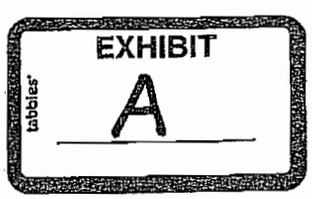
AWARD OF ARBITRATOR

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement entered into by the above-named parties, dated January 2, 2006, and having been duly sworn and having duly heard the evidence presented by the parties, FIND as follows:

## I. INTRODUCTION

This matter was originally filed in the Cuyahoga County Common Pleas Court, Case No. 06-604927, before the Honorable Eileen T. Gallagher. In the Common Pleas Court case, Plaintiff was Delene Evert and Defendants were Ganley Westside Imports, Inc., Tony Devito, and Leonard Evanoff. Since the contractual documents contained an arbitration clause, Defendants filed a Motion for Stay of Proceedings pending arbitration, which was granted on December 11, 2006.

Under the auspices of the American Arbitration Association, this case initially proceeded pursuant to the Expedited Procedures of the Commercial Dispute Resolution Procedures, together with the Supplementary Procedures for Consumer-Related Disputes, but, by agreement of the parties, the expedited nature of this case ceased, and it became one governed by the traditional Commercial Arbitration Rules ("Rules").



## II. FACTUAL BACKGROUND

While many of the facts are not disputed, they merit recitation because they have spawned somewhat complex legal issues.

On January 2, 2006, Claimant, Delene Evert, with her brother, went to Respondent, Ganley Westside Imports, Inc. ("Ganley"), to purchase an automobile. For several years prior to this date, Claimant had driven an automobile, which had become old and unreliable. Claimant spent approximately 2-3 hours with Ganley's sales person, Respondent, Tony Devito ("Devito"), who was employed by Ganley for a very brief period of time.

During the several hours Claimant spent at Ganley, she asked Devito whether the car in which she was interested, a 2005 Subaru ("the Subaru"), had ever been involved in an accident. Devito said that it had not. When she inquired a second time, Devito referred her inquiry to Respondent, Leonard Evanoff ("Evanoff"), the sales manager, who purchased for Claimant a Carfax report. Carfax reports list, from publicly available information, accidents involving automobiles. There was more than one version of the Carfax report, see Cl. Ex. 22 and Resp. Ex. G, but this is inconsequential, as they each indicated the Subaru had not been involved in an accident.

It is undisputed, however, that the Subaru, which had been used by Ganley as a "service loaner", had been involved in an accident in late 2004. It was damaged in the approximate amount of $14,000.00, and was out of service for eight months (See Cl. Ex. 2).

Neither Devito nor Evanoff had actual knowledge that the Subaru had been involved in an accident, particularly since no documentation was in the sales file or "deal jacket". Mr. Robert Lisy, Ganley's General Manager, was aware that the Subaru had been involved in an

accident, but he had no personal contact with Claimant at any time and believed that the accident only needed to be disclosed with respect to "new" cars.

## III. DISCUSSION

### A. OCSPA Claims.

#### 1. Misrepresentation.

It is undisputed that Claimant asked whether the Subaru had been involved in an accident and that she was told it had not. It is also undisputed that, indeed, the Subaru had been involved in an accident and that Ganley, through Lisy, was aware of this fact. Ganley's knowledge of the Subaru's involvement in an accident renders irrelevant the, apparently undisputed, facts that the sales file had no indication of an accident and that Ganley's Service Department did not have "the body shop estimate or invoice in its file." (Resp. Post-Hearing Brief, p. 1). (See *Raible v. Raydel* (1954), 162 Ohio St. 25 (principal bound by knowledge of agent received in due course of employment). In addition, Lisy's testimony that, based upon his understanding of the law, he was not obligated to disclose this information because the vehicle was not a "new" one, while credible, is not, in the Arbitrator's view, sufficiently persuasive to out-weigh the simple fact that Claimant was misled. Thus, the Arbitrator finds that a misrepresentation occurred and that the OCSPA was violated. *Birch vs. Castrucci, Inc.*, (1999) WL 959165 (Ohio App. 2 Dist.); Cl. Ex. 28.

Respondent also argues (Post-Hearing Brief, p. 5) that R.C. §1345.11(A) should apply, i.e., that any violation of the CSPA "resulted from a *bona fide* error notwithstanding the maintenance of procedures recently adopted to avoid the error" and that, therefore, "no civil penalties shall be imposed against the supplier under division (D) of Section 1345.07 of the Revised Code... and monetary recovery shall not exceed the amount of actual damages resulting

from the violation." *Id.* The Arbitrator disagrees. If Ganley truly wanted to avoid the circumstances that occurred in this case, it would have instructed its Sales Manager to discuss this type of customer inquiry with its General Manager and/or it would have instructed its General Manager to place this type of information into the sales file or "deal jacket". Ganley did neither. Accordingly, the Arbitrator finds that Section 1345.11(A) is inapplicable.

2. Contradictory Information.

Claimant asserts that Respondents violated the CSPA because they provided Claimant with a copy of the Contract, which had only one box marked, indicating that the Subaru was used, as compared to Ganley's copies of the Contract, which contained two marked boxes, indicating that the Subaru was used and a rental. (Compare Cl. Ex. 11 with Resp. Exs. A and B). To support its argument, Claimant cites *Renner vs. Derin Acquisition Corp.*, 111 Ohio App. 3d 326 (8th Dist. 1996). *Renner*, however, is inapposite and the Arbitrator finds that the existence of contradictory information, under these facts, does not constitute a violation of the CSPA.

3. Failure to Disclose Damage to the Subaru.

Claimant asserts that the Subaru was a "new vehicle" and that, therefore, failure to disclose the damage to it is a separate violation of the CSPA. To support her argument, Claimant relies on OAC 109: 4-3-16 (B)(14), which, in turn, incorporates the definition of "new motor vehicle" in R.C. §4517.01(C). "New motor vehicle" is defined as one to which the legal title has never been transferred by a manufacturer...to an "ultimate purchaser". R.C. §4517.01(D) defines "ultimate purchaser" as the first purchaser of a vehicle other than a dealer purchasing in the capacity of a dealer who, in good faith, purchases a new motor vehicle for purposes other than resale.

It is undisputed, however, that the Subaru had been driven for approximately 7,100 miles before Claimant purchased it, and it is also undisputed that Claimant was aware of this fact, even though she testified that she thought she was purchasing a "new vehicle". The Contract and other related documents also contravene the notion that the Subaru was a "new motor vehicle". Well established rules of statutory construction dictate that statutes be construed in accordance with common sense and not result in absurdity. *State ex rel. Webb v. Board of Education* (1984), 10 Ohio St. 3d 27.

Nevertheless, the goal of statutory construction is to give effect to the legislature's intention. *Cline vs. Ohio Bureau of Motor Vehicles* (1991), 61 Ohio St. 3d 93, 97. And, the legislature's intention, as expressed in R.C. §4517.01(C) and (D) and as implemented pursuant to OAC 109:4-3-16(B)(14), seems apparent. While Respondents argue that there is no law precluding the interpretation of "ultimate purchaser" to mean a dealer, they cite no legal authority to support this proposition. In addition, it is undisputed that the title was transferred from the manufacturer to Ganley. It is also undisputed that Ganley purchased the Subaru as a dealer and, virtually undisputed, for purposes of resale. Accordingly, it was not the "ultimate purchaser". The Arbitrator, therefore, finds, as a matter of law, that the Subaru was new and that Ganley violated the CSPA by failing to disclose the damage to the car.

4. Failure to Integrate Material Terms Into the Contract.

Claimant asserts that Respondents failed to integrate into the Contract "the representation that the car had not been wrecked" (Claimant's Post-Hearing Brief, p. 11) and that this violates the CSPA because this representation was a material term to the Contract.

The Arbitrator agrees and so finds.

B. INDIVIDUAL LIABILITY OF DEVITO AND EVANOFF

Claimant asserts that Devito and Evanoff should be held personally liable and cites *Inserra v. J.E.M. Building Corporation*, 2000 W.L. 1729480 (Ohio App. 9 Dist.), in support of her argument. However, *Inserra* simply provides that an individual can be held personally liable under the CSPA. While the Arbitrator agrees that the CSPA is to be liberally construed and that it does not require intent or knowledge of one accused of violating it, *Renner, supra,* p. 4, there was insufficient evidence that either Devito or Evanoff did anything to induce Claimant to believe that the car was not involved in an accident. Purchasing a Carfax report, which, although inaccurate, was produced by an independent third-party, is not sufficient conduct to subject either one to individual liability. In addition, both Devito and Evanoff were complying with the rules, policies, and procedures of Ganley and, as employees of Ganley, owed it an undivided duty of loyalty to do so. See *Orbit Electronics, Inc. v. Helm Instrument Co., Inc.* (2006), 167 Ohio App. 3d 301, 313 (8 Dist.), citing *Connelly v. Balkwill* (1954), 160 Ohio St. 430, 440.

Accordingly, Claimant's CSPA claims against Devito and Evanoff are denied.

C. DAMAGES UNDER THE CSPA

1. Misrepresentation

Revised Code §1345.09(B) essentially provides that any person who proves a violation of the CSPA for conduct that was declared deceptive or unconscionable, by rule or case law before the date of the conduct in question, which case law has been made available for public inspection, pursuant to R.C. §1345.05(A)(3), is entitled to elect remedies. The injured party can choose to rescind the transaction or she can choose damages in which case she is eligible to receive three times her actual economic damages or $200.00 whichever is greater, together with an amount not to exceed $5,000.00, as non-economic damages.

Once an election of remedies has been made, in this case for damages, and once a consumer has satisfied the criteria for treble damages under R.C. §1345.09(B), an award of treble damages is required – the trial court, or in this case, the Arbitrator, has no discretion. *Alexander v. Transmission by Bruce, Inc.*, 2008 W.L. 1903815 (Ohio App. 8 Dist.).

Regarding damages, Claimant primarily relied on the testimony of her expert witness, Mr. Justin Johnson. The Arbitrator, contrary to Respondents' argument, finds that Mr. Johnson was qualified to give expert testimony based upon his years of experience in repairing vehicles and his engineering education. Ohio Rule of Evidence 702(B). The Arbitrator also finds Johnson's testimony to be sufficiently reliable, pursuant to Ohio Rule of Evidence 702(C), because he inspected the Subaru on two occasions, and he attended an auction regarding it at which there was a bid in the amount of $10,000. There is no reason to disbelieve Mr. Johnson's testimony, and it is well known that auctions are generally regarded as a classic example of an arms length transaction. In addition, Mr. Johnson's testimony is consistent with the preferred method of calculating damages in cases where automobiles have been damaged in accidents. See *Erie Insurance Co. v. Howard*, 2004 W.L. 2244489 (Ohio App. 9 Dist.). The fact that he had never testified before as an expert (Resp. Post-Hearing Brief, p. 6) in any type of proceeding is secondary, if for no other reason, everyone in any walk of life has to have a first time. Thus, the Arbitrator finds that Claimant suffered economic damages in the amount of $11,571.65 (Cl. Post-Hearing Brief, p. 9).

Claimant, however, seeks damages in the amount of three times both her economic damages and non-economic damages. R.C. §1345.09(B) clearly states that the non-economic damages, which are subject to being trebled, are "plus" the economic damages. In other words, only the economic damages are trebled.

Accordingly, the Arbitrator finds that the actual amount of trebled damages to which Claimant is entitled as a result of Ganley's misrepresentation is $34,714.95 and that she is entitled to non-economic damages in the amount of $5,000.00, for a total of $39,714.95, as to Ganley only. (See Section III.B., *supra*, p. 6).

2. Contradictory Information

Claimant is not entitled to any damages for this claim. (See Section III.A.2., *supra*, p. 4).

3. Failure to Disclose Damage to the Subaru

Since Claimant has already been awarded economic damages, which have been trebled, together with non-economic damages, she is entitled to an award against Ganley of only $200.00 for this violation. (See Section III.A.3., *supra*, p. 4-5).

4. Failure to Integrate Material Terms Into the Contract

Since Claimant has already been awarded economic damages, which have been trebled, together with non-economic damages, she is entitled to an award against Ganley of only $200.00 for this violation. (See Section III.A.4., *supra*, p. 5).

D. DECLARATORY AND INJUNCTIVE RELIEF UNDER THE CSPA

Revised Code §1345.09(D) clearly permits a consumer to seek a declaratory judgment and an injunction against any conduct that violates Chapter 1345. Claimant's specific requests for declaratory judgment, i.e., "[t]hat making misrepresentation [sic], making contradicting statements, failing to disclose the extent of prior damage, and failing to integrate all material representations into the contract are each individual violations of the CSPA...," (Cl. Post-Hearing Brief, p. 13-14) is somewhat redundant. To the extent that the Arbitrator has already ruled that CSPA violations occurred, Claimant's request for a declaratory judgment is granted.

Claimant's request for "[a]n injunction against the continuation of these practices by Respondents" (Cl. Post-Hearing Brief, p. 14) is, under the facts of this case and with the exception of making contradicting statements, granted. Specifically, upon an inquiry from a prospective customer as to whether any vehicle in which the prospective customer is interested has been involved in an accident, Ganley shall no longer fail to disclose, regardless of who in Ganley's organization possesses the information, that such vehicle has been involved in an accident. (See R-43 of the Rules.)

E. ATTORNEYS' FEES

An award of attorneys' fees under the CSPA, unlike an award of treble damages, is discretionary. *Reagans v. Mountainhigh Coachworks, Inc., et al.* (2008), 117 Ohio St. 3d 22. As stated in *Reagans*, "In Ohio, parties to litigation generally are responsible for their own attorney's fees, absent a statute or an enforceable contract providing for the losing party to pay the prevailing party's attorney's fees, or absent bad faith by the unsuccessful litigant. *Id.* at 31. Thus, an award of attorney's fees is a penalty to discourage conduct prohibited by the CSPA. Since Claimant has already been awarded treble damages, which is penal in nature, and since Ganley obtained a Carfax report and the Subaru did not appear to have been involved in an accident, the Arbitrator denies Claimant's request for attorney's fees.

F. FRAUD AND PUNITIVE DAMAGES

It is axiomatic that Claimant is entitled only to one recovery. In view of the fact that she has already been awarded treble economic damages, statutory penalties, and non-economic damages, Claimant's claims for fraud and punitive damages are denied because she cannot recover again for the same injury or, stated another way, her fraud and punitive damage claims are moot.

## III. AWARD

Claimant is awarded $40,119.95 in damages against Ganley only. The administrative filing and case service fees of the American Arbitration Association, totaling $1,250.00, and the fees and expenses of the Arbitrator, totaling $4,180.00, shall be borne entirely by Ganley Westside Imports, Inc.

Claimant is also awarded declaratory and injunctive relief, as previously described *supra*.

This Award is in full settlement of all claims and counterclaims submitted to this Arbitration. All claims not expressly granted herein are hereby, denied.

I, David A. Schaefer, do hereby affirm upon my oath as Arbitrator, that I am the individual described in and who executed this instrument which is my Award.

6/26/08
DATE

DAVID A. SCHAEFER, ARBITRATOR