

**IN THE COMMON PLEAS COURT OF
OTTAWA COUNTY, OHIO**

Douglas G. Borrer,	:	Case No. 03-CVH-130
	:	
	:	
Plaintiff,	:	Judge Paul C. Moon
	:	
	:	
v.	:	<u>FINDINGS OF FACT &</u>
	:	<u>CONCLUSIONS OF LAW; ORDER</u>
	:	
MarineMax of Ohio, Inc., et. al.,	:	
	:	
	:	
Defendants.	:	

* * * * *

{¶1} This cause is before this Court following a three day bench trial from May 2, 2005 to May 4, 2005. This Court, *sua sponte*, requested that the parties submit proposed findings of fact and conclusions of law.¹ Defendant and Plaintiff’s Proposed Findings of Fact and Conclusions of Law were filed June 6, 2005.

{¶2} This Court has reviewed the record, all pleadings, exhibits and the relevant case law, including the trial testimony of Douglas G. Borrer, Dani Borrer, Deb Halsey, Tom Schmidt,

¹ See Civ. R. 52 which states: “* * * [T]he court shall state in writing the conclusions of fact found separately from the conclusions of law. * * * the court, in its discretion, may require any or all of the parties to submit proposed findings of fact and conclusions of law; however, only those findings of fact and conclusions of law made by the court shall form part of the record.”

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Steve Lenthe, Greg Group, Mark Walker and Karl Oreskovich, the trial deposition testimony of Tim Mills and Leonard Krestan, and the video deposition of Steven A. Knox, and numerous trial exhibits.

{¶3} For the foregoing reasons, this Court finds that Plaintiff has demonstrated that Defendant, MarineMax of Ohio, Inc., violated the Ohio Consumer Sales Practices Act (CSPA), R.C. 1345.01, et seq., which prohibits deceptive acts and practices in connection with a consumer transaction. As well, this Court finds that Plaintiff has demonstrated that Defendant engaged in fraud and deception, as they have been developed generally under common law, wherein intent is an essential element and that the fraud complained of was aggravated by malice and ill will on the part of Defendant, and that the fraudulent inducement was “particularly gross or egregious.”²

{¶4} Thus, this Court finds the actual damages suffered by Plaintiff to be \$484,591.27 and renders judgment accordingly in favor of the Plaintiff, Mr. Douglas G. Borrer, in the amount of in \$1,453,773.80 as treble damages permitted under the CSPA, and \$484,591.27 as punitive damages under the fraud claim. Thus, the total award, exclusive of attorney’s fees and costs is \$1,938,365.00. This Court has determined that Plaintiff is entitled to attorney’s fees and the amount to which Plaintiff is entitled will be set by this Court following a hearing on the matter of attorney’s fees and expenses.

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I. BACKGROUND

{¶5} On August 9, 2002, Plaintiff, Douglas G. Borrer purchased a 51 foot, 2001 Sea Ray Yacht from Defendant, MarineMax of Ohio, Inc., for \$784,151.83.

{¶6} Although Plaintiff was informed that the vessel had “hit a can”³ and that it was “hit pretty hard out by the reef,”⁴ he alleged that he was not informed as to the severity of the damage, which included significant damage to the vessel’s stringer system and structural integrity. When informed as to the nature and extent of the damage to his vessel, Plaintiff immediately “revoked his acceptance of the vessel and demanded rescission.”⁵ Plaintiff never used the vessel again and after the Defendant refused rescission, later sold it for \$350,000.00.

{¶7} On May 19, 2003, Plaintiff filed suit, alleging fraud, violations of the CSPA, and that he “rightfully revoked acceptance of the [vessel].”⁶ In his Complaint, Plaintiff alleges that “[b]ecause of the significance of the undisclosed damage and the inferior repairs, the boat was not safe or seaworthy.”⁷ As a result, Plaintiff alleges that “[a]s a direct and proximate cause of the defendants’ false statements, Borrer purchased the boat and has suffered damages as a result thereof.”⁸ Further, Plaintiff alleges that “MarineMax knowingly committed unfair, deceptive and unconscionable acts and practices in violation of [the CSPA].”⁹ Finally, Plaintiff alleges

² *Combs Trucking, Inc. v. Internatl. Harvester Co.* (1984), 12 Ohio St. 3d 241, 466 N.E.2d 883, 1984 Ohio LEXIS 1204.

³ Testimony of Douglas G. Borrer.

⁴ Testimony of Douglas G. Borrer.

⁵ Plaintiff’s Exhibit 18; Testimony of Douglas G. Borrer.

⁶ Complaint, at 6.

⁷ Complaint, at 3.

⁸ Complaint, at 4.

⁹ Complaint, at 4.

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that as a “result of MarineMax’s refusal to honor Borrer’s revocation of the acceptance of the [vessel], Borrer has suffered damages in the amount of \$780,141.83; and other amounts * * *.”¹⁰

II. FINDINGS OF FACT

{¶8} In making its findings of fact, this Court has considered the evidence presented, including the testimony received from the witnesses, exhibits admitted during the trial and facts agreed to by counsel. The considered evidence includes both direct and circumstantial. In weighing the evidence, this Court has also considered the credibility of the witnesses. Where differences or conflicts in the testimony arose, this Court resolved them and decided where the actual truth is.

{¶9} Civ. R. 52 states that “* * * only those findings of fact and conclusions of law made by the court shall form part of the record.”¹¹ And Civ. R. 52 rule permits a court, in its discretion, to adopt the proposed findings of fact and conclusions of law. Although various courts have recognized that “[a] trial court may adopt verbatim a party’s proposed findings of fact and conclusions of law as its own if it has thoroughly read the document to ensure that it is completely accurate in fact and law,”¹² this Court declines to do so here because of the factual allegations, the existence of the fraud claim, which includes the element of *scienter*, and whether the aggravating factors supporting an award of punitive damages are present.

¹⁰ Complaint, at 5.

¹¹ Civ. R. 52 also states in relevant part: “When questions of fact are tried by the court without a jury, judgment may be general for the prevailing party unless one of the parties in writing or orally in open court requests otherwise before the journal entry of a final order * * * in which case, the court shall state in writing the conclusions of fact found separately from the conclusions of law. * * *”

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{¶10} Accordingly, this Court finds:

{¶11} • On May 18, 2001, and in Port Clinton, Ohio, Defendant took delivery of a 51 foot, 2001 Sea Ray 510 Yacht (“vessel”).

{¶12} • On June 5, 2001, the vessel was grounded hard on West Harbor Reef in Lake Erie, Ottawa County, Ohio, while on a sea trial. Steve Lenthe, a service technician employed by Defendant, testified that he was operating the vessel at 20-30 miles per hour when the grounding occurred on the reef, which is solid limestone, and is marked by a “green can” or navigational buoy.¹³

{¶13} • The vessel was severely damaged and according to International Transportation Services, Inc., (“ITS”), the damage included fractured and delaminated strut pads, the port and starboard rudders were bent, the propeller shafts were distorted, and the stringers were fractured at the attachment to the bulkhead.¹⁴ It was estimated that it would cost \$76,154.47, including nearly 400 man-hours of labor to repair the vessel.¹⁵

{¶14} • The vessel was returned to Sea Ray’s Sykes Creek manufacturing facility, Merritt Island, Florida, for repairs and there, the engines were removed to facilitate the repairs. The total cost of the repairs at Sykes Creek totaled \$76,154.47.¹⁶ Mr. Krestan, Sea Ray’s customer manager inspected the vessel and he testified that the repairs had been properly made.¹⁷

¹² *Hinkston v. The Finance Company*, 1st Dist. No C-980972, 2000 Ohio App. LEXIS 2010, *6, citing *State v. Combs* (1994), 100 Ohio App. 3d 90, 110, 652 N.E.2d 205; *Adkins v. Adkins* (1988), 43 Ohio App. 3d 95, 539 N.E.2d 686; *In Re Spears*, 4th Dist. No. CA 1718, 1996 Ohio App. LEXIS 4682.

¹³ Testimony of Stephen Lenthe.

¹⁴ Plaintiff’s Exhibit 6.

¹⁵ Plaintiff’s Exhibit 7.

¹⁶ Plaintiff’s Exhibit 7.

¹⁷ Deposition Testimony of Leonard Krestan, at 13-16.

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But in his deposition, and on cross, Mr. Krestan admitted that he was not involved in the repairs, did not oversee any of the repairs, and did not survey any of the repairs.¹⁸

{¶15} • On September 12, 2001, the vessel was returned to Defendant, and was inspected by Mr. Karl Oreskovich, Service Manager for Defendant who testified that he believed that it had been properly repaired.¹⁹ After being displayed at one or more boat shows, the vessel was placed in winter storage.²⁰

{¶16} • At a time when the vessel was out of the water, Defendant contacted Mr. Tom Schmidt, and informed him that it had a vessel for sale that had been damaged, but that they would cut him a good deal on it. However, after inspecting the vessel and observing the visible damage on the hull, Mr. Schmidt requested documentation and was provided only with the open repair order. Concerned by the absence of a marine survey and photos showing the damage and the subsequent repairs to the vessel, Mr. Schmidt declined to purchase the vessel, testifying “I was no longer interested.”²¹

{¶17} • In early 2002, an engine repairman informed Mr. Oreskovich that he had observed gel coat peeling from one of the vessel’s engine room stringers, an area which had been repaired by Sea Ray.²² In April, 2002, Mr. Oreskovich took photographs of the cracking in the engine stringers of the vessel and contacted Sea Ray about the problem.²³

¹⁸ Deposition Testimony of Leonard Krestan, at 55; Defendant’s Exhibit KK.

¹⁹ Testimony of Karl Oreskovich.

²⁰ Plaintiff’s Exhibit 9.

²¹ Testimony of Tom Schmidt.

²² Testimony of Karl Oreskovich. See Defendant’s Findings of Fact and Conclusions of Law, at 3.

²³ Plaintiff’s Exhibit 31.

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{¶18} • Sea Ray contacted Tim Mills of Atlantic Boat Repair, Inc., to examine the vessel and provide a repair estimate; including redoing the original SeaRay repairs to the engine stringers. Mr. Mills estimated that it would cost \$23,998.00, before discounts, to repair the vessel.²⁴ The vessel was repaired by Atlantic Boat Repair, Inc., at a total cost of \$22,507.81, including 360 man-hours of labor.²⁵

{¶19} • Mr. Mills testified that in addition to Sea Ray's previous repairs to the engine stringer, Atlantic Boat Repair, Inc., also redid the original repairs to the engine stringer and repaired other areas of damage found at this time. Mr. Mills testified that he "chased out" and repaired the damage to factory standards by going beyond the damaged areas of the stringers by about 2 feet.²⁶ Mr. Mills testified that he believed the vessel to be fully repaired and to Sea Ray's factory specifications. As well, following the repairs by Atlantic Boat Repair, Inc., Mr. Oreskovich testified that he believed the vessel to be fully repaired.

{¶20} • The repairs to the vessel by Sea Ray and Atlantic Boat Repair, Inc., totaled \$98,662.28.

{¶21} • The vessel was then cleared for sale by Mr. Oreskovich in late July, 2002. At this time, the vessel was put in the water and displayed for sale. Defendant asserts that there were no known or visible problems relating to the accident and subsequent repairs, and that its sales staff was instructed to disclose the vessel's damage and repair history to prospective

²⁴ Plaintiff's Exhibit 32.

²⁵ Plaintiff's Exhibit 34.

²⁶ Deposition of Tim Mills, at 35-36, 42-43, 46-49, 60-61.

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purchasers.²⁷ However, it admits that no instructions were given as to the specific disclosures that should be made.²⁸

{¶22} • On Friday, August 2, 2002, Plaintiff contacted Defendant to inquire about purchasing a new Sea Ray Yacht. Mr. Walker, a salesman for Defendant, was assigned to assist Plaintiff in identifying a suitable vessel. A knowledgeable and experienced boater, Plaintiff was highly motivated to purchase a new vessel as soon as possible because of problems with his old vessel, and the quickly approaching end of the 2002 boating season.

{¶23} Accompanied by his daughter, Dani Borrer, and her friend, Deb Halsey, Plaintiff focused on a 2001 Sea Ray 510 Yacht. In questioning Mr. Walker why a new 2001 510 was still for sale in August of 2002, Plaintiff was informed that the vessel had been damaged when it “hit a can,” near the reef, and that the damage was to the starboard side of the vessel.²⁹ Plaintiff, Ms. Borrer and Ms. Halsey all testified that Mr. Walker led them to the starboard side of the vessel to show them the portion of the hull that had been damaged, and that no damage was visible. Defendant argues that Plaintiff was given full and unrestricted access to inspect the vessel, took the vessel on a sea trial, and was informed that the vessel had previously been damaged and repaired by Sea Ray.³⁰

{¶24} Plaintiff acknowledges that he was aware that this was a 2001 model year vessel and had not been previously sold because it had been damaged when it “hit a can,” and that it

²⁷ Testimony of Karl Oreskovich; Testimony of Mark Walker.

²⁸ Testimony of Karl Oreskovich; Testimony of Mark Walker.

²⁹ Testimony of Douglas G. Borrer. See Testimony of Dani Borrer; Testimony of Deb Halsey.

³⁰ See Defendant’s Proposed Findings of Fact & Conclusions of Law, at 5.

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was repaired by Sea Ray.³¹ As well, Plaintiff acknowledged that he was aware that as a result of the damage, the vessel was being sold with an extended warranty to cover the repairs made to the vessel. As such, Defendant argues that Plaintiff had received enough information to warrant further investigation of the vessel's damage and repair history before making his decision to purchase the vessel. Acknowledging that it was his decision what further information he wanted to obtain before making his decision, Plaintiff, however, conditioned his purchase of the vessel upon talking with Mr. Oreskovich.

{¶25} Because Mr. Oreskovich was on vacation, Plaintiff left a \$5,000.00 deposit on his credit card to hold the vessel.³² Plaintiff testified that Mr. Walker told him that prospective purchasers were flying up from Florida that weekend to inspect the vessel.

{¶26} • The following day, on Saturday, August 3, 2002, at 9:42 a.m., Plaintiff spoke briefly with Mr. Oreskovich concerning the vessel and the damage it had sustained. Mr. Oreskovich testified that he told Plaintiff only that the vessel had been “hit pretty hard” but that it had been well repaired.³³ However, Mr. Oreskovich testified that he did not discuss the specific damage the vessel sustained, or the repairs made, because Plaintiff did not “ask the right questions.”³⁴ Mr. Oreskovich conceded that he did not inform Plaintiff that the stringers were damaged, or of the specific repairs made by Atlantic Boat Repair, Inc.

{¶27} Plaintiff testified that his conversation with Mr. Oreskovich was relatively brief because Mr. Oreskovich was with his family crossing the Chesapeake Bay bridge and he was on

³¹ Testimony of Douglas G. Borrer.

³² Plaintiff's Exhibit 12, at 9.

³³ Testimony of Douglas G. Borrer; Testimony of Karl Oreskovich; See Testimony of Gregory Group.

³⁴ Testimony of Karl Oreskovich.

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vacation. Plaintiff testified that he told Mr. Oreskovich he was thinking about buying the 51 and that Mr. Walker told him that the vessel had been damaged, but that he wanted to hear from Mr. Oreskovich what kind of shape it was in. Plaintiff testified that Mr. Oreskovich told him that the vessel was hit pretty hard out by the reef on its way to the Cedar Point Boat show, so it was shipped back to Sea Ray, but that when it came back, Mr. Oreskovich wasn't happy with the way it was fixed, so he called in somebody. Plaintiff asserted that Mr. Oreskovich told him that the boat was perfect, it was in great shape, and it was fixed.

{¶28} Plaintiff testified that Mr. Oreskovich had always been a “straight shooter” with him, “he liked Karl,” and that he had “trusted Karl.”³⁵ Plaintiff also testified that he figured that if he talked to Mr. Oreskovich and if he didn't think it was a good boat, he'd suggest looking at the 2002, knowing that the vessel would be parked near Mr. Oreskovich's mother-in-law's house.

{¶29} Within an hour of his conversation with Mr. Oreskovich, Plaintiff contacted Mr. Walker and informed him that he would purchase the vessel. Defendant processed Plaintiff's credit card charge at 10:40 a.m. and sent him the first page of a proposed Purchase Agreement at 11:30 a.m.³⁶ Plaintiff faxed the signed Purchase Agreement back at 1:48 p.m., and the parties agreed that the vessel would be ready for delivery on Friday, August 9, 2002.

³⁵ Testimony of Douglas G. Borrer.

³⁶ Plaintiff's Exhibit 12, at 3-4.

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{¶30} • On Friday, August 9, 2002, Plaintiff completed the purchase of the vessel, signing various closing documents, including a document identified as a “Disclosure Acknowledgment.”³⁷ The Disclosure Acknowledgement provided:

Disclosure Acknowledgment

In conjunction with the purchase of the boat listed below, as the purchaser, I hereby acknowledge that the following history of this boat has been disclosed to me.

2001 Sea Ray 510DA/HT
HIN SERV0851B101

- The boat sustained damage prior to my purchase.
- The boat was returned to the manufacturer and repaired to factory specifications.
- All normal factory warranties are in effect with a 6 month extension of the Sea Ray limited warranty.

Date: _____

Doug Borrer – Purchaser

{¶31} Plaintiff was not provided with any information beyond that provided in the Disclosure Acknowledgment, and the information provided here did not differ from the information provided to him by Mr. Walker and Mr. Oreskovich. Plaintiff was not provided with any additional information, such as the repair estimates created by ITS or Atlantic Boat Repair,

³⁷ Plaintiff’s Exhibit 13.

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Inc.³⁸ Nor was he shown the cost for the repairs made by Sea Ray and Atlantic Boat Repair, Inc., including the man-hours necessary to repair the vessel; and most importantly, he was not told of the damage to the vessel's stringer system and structural integrity.³⁹

{¶32} • Plaintiff purchased the vessel for \$780,151.83, including \$26,641.83 for taxes, on August 9, 2002.⁴⁰ At that time, Plaintiff took delivery on the vessel and used it that weekend and approximately three more weeks, after which the vessel was placed in heated, dry storage for the winter.⁴¹

{¶33} • In January, 2003, after becoming aware that there might be an issue involving the vessel, Plaintiff contacted Mr. Gregory Group, a marine surveyor.⁴² After speaking with Mr. Group, who informed him that the vessel had been grounded on a reef, sustaining severe damage, and that the vessel's stringer system had been damaged and repaired, Plaintiff retained Mr. Group to perform a survey of the vessel.⁴³

{¶34} Mr. Group conducted his survey of the vessel on January 31, 2005, and his report reflects that the application of fiberglass over bottom paint, “* * * calls into question the structural repair quality of all the external work that was performed on the exterior of the hull,” and that while “[n]o apparent structural damage was noted at the forepeak or forefoot where visible, [] damage might exist in enclosed areas.”⁴⁴ The report also stated that “[s]tructural damage is suspected to exist forward of the forward engine bulkhead because of the quality of

³⁸ Testimony of Douglas G. Borrer. See Plaintiff's Proposed Findings of Fact & Conclusions of Law, at 6.

³⁹ Testimony of Douglas G. Borrer. See Plaintiff's Proposed Findings of Fact & Conclusions of Law, at 6.

⁴⁰ Plaintiff's Exhibit 12, at 5.

⁴¹ Testimony of Douglas G. Borrer. See Plaintiff's Proposed Findings of Fact & Conclusions of Law, at 6; Defendant's Proposed Findings of Fact & Conclusions of Law, at 9.

⁴² Testimony of Douglas G. Borrer.

⁴³ Testimony of Douglas G. Borrer.

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the exterior work, the exterior damage and interior damage, noting that the readily accessible areas abaft [sic] the bulkhead have apparently been reworked.”⁴⁵ Thus, Mr. Group concluded in his survey report that that “this vessel is NOT seaworthy or otherwise fit for its intended purpose.”⁴⁶

{¶35} Mr. Steven A. Knox, a marine surveyor who inspected the vessel for the Defendant, testified that “stringers in boats of this type traditionally run parallel to the centerline of the boat, and they are fastened in some manner to the bottom of the boat to provide reinforcing and rigidity. So in a sense, they are like a frame, much as one would see framing in a house, for instance, that’s attached to the inside wall or the outside walls.”⁴⁷ Testifying that the vessel is “not a metal or steel boat,” Mr. Knox conceded, however, that “these stringers are as close to a frame as you are going to get in a fiberglass boat.”⁴⁸ Thus, the stringer system “provides support for the hull.”⁴⁹

{¶36} Mr. Knox acknowledged that he did not “have any reason to disagree” with the ITS report characterizing the damage to the port side running gear and hull structure as “significant.”⁵⁰ Conceding that “the repairs to the engine compartment were substandard,”⁵¹ Mr. Knox testified that the repairs did not meet factory specifications at the time Atlantic Boat Repair, Inc., began work to fix the problems in the engine compartment.

⁴⁴ Plaintiff’s Exhibit 28, at 2.

⁴⁵ Plaintiff’s Exhibit 28, at 3.

⁴⁶ Plaintiff’s Exhibit 28, at 6.

⁴⁷ Deposition of Steven A. Knox, at 148-149.

⁴⁸ Deposition of Steven A. Knox, at 149.

⁴⁹ Deposition of Steven A. Knox, at 149.

⁵⁰ Deposition of Steven A. Knox, at 100.

⁵¹ Deposition of Steven A. Knox, at 117.

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{¶37} However, Mr. Knox disagreed with much of Mr. Group’s findings, asserting that he was unable to verify many of the “defects” listed in Mr. Group’s report.⁵² Specifically, Mr. Knox was unable to locate any softness or damage to the vessel’s forward keel, which he noted is often the result of improper blocking during storage, and that this area was also well forward of the area of damage sustained by the vessel when it hit the reef.⁵³ Mr. Knox concluded that the vessel was structurally sound and that no further repairs were necessary.

{¶38} Although Mr. Knox conceded that he could not “tell conclusively, based upon a visual examination of these stringers from the bulkhead looking 18 inches, whether there is any disruption of the attachment of that stringer to the hull,” and that “the only way to be 100-percent certain that those stringers aren’t damaged is to see them,” he asserted that based on his “inspection and my experience, within a reasonable degree of engineering certainty, that there is no damage forward of that bulkhead,” arguing that while “I cannot tell you conclusively whether the sun is shining outside today, but I have reasonable expectations based on what I’ve done before. And that’s the same case here.”⁵⁴ But Mr. Knox admitted that it is impossible to ascertain whether there was any damage to the area forward of the bulkhead.⁵⁵

{¶39} Mr. Knox also testified that given the condition of the stringers prior to the repair by Atlantic Boat Repair, Inc., he would not take his family out on a boat that had its stringers and laminate in similar condition, asserting “[i]t’s a structural issue.”⁵⁶

⁵² See Defendant’s Proposed Findings of Fact & Conclusions of Law, at 13.

⁵³ Deposition of Steven A. Knox, at 30-31; 50-73.

⁵⁴ Deposition of Steven A. Knox, at 160: 7-11.

⁵⁵ See Deposition of Steven A. Knox, at 155:9-17.

⁵⁶ Deposition of Steven A. Knox, at 165.

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{¶40} The vessel's stringer system is one of its more important components, and as Plaintiff asserted, are a critical component of the vessel. Plaintiff testified that he was an experienced Great Lakes boater, and that he personally would not take his family out on the Great Lakes in a boat that had been so badly damaged. Plaintiff also testified that he would never have bought the vessel if he had known of the structural damage it had sustained.

{¶41} • After learning the nature and extent of the damage to the vessel, Plaintiff never saw the vessel again and never put it back in the water.⁵⁷

{¶42} • On March 17, 2003, Plaintiff, through his attorney, revoked his acceptance of the vehicle and demanded rescission.⁵⁸ Defendant refused that revocation, offering instead, to provide any warranty repairs that might be needed.⁵⁹

{¶43} • On May 19, 2003, Plaintiff filed a complaint alleging fraud, violations of the CSPA, and revocation of acceptance.⁶⁰

{¶44} • Mr. Group opined that the vessel's fair market value was \$300,000.00 at the time the boat was purchased by the Plaintiff on August 9, 2002.⁶¹ His estimate was based on his January 2003 survey of the vessel as well as his April 2003 survey report.⁶² Mr. Group testified that the vessel's value was substantially diminished because of certain defects and problems he observed. Acknowledging that his estimate was impacted by the potential for structural defects forward of the engine room bulkhead, Mr. Group asserted, however, that based on his research,

⁵⁷ Testimony of Douglas G. Borrer. See Plaintiff's Proposed Findings of Fact & Conclusions of Law, at 7.

⁵⁸ Plaintiff's Exhibit 18.

⁵⁹ Testimony of Douglas G. Borrer; Testimony of Karl Oreskovich; Plaintiff's Exhibits 18, 22; Defendant's Exhibit FF, GG.

⁶⁰ Complaint, filed May 19, 2003.

⁶¹ Testimony of Gregory Group; Plaintiff's Exhibit 28.

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his inspection of other 510 Sea Ray Sundancers and their selling prices, the application of the BUC, ABOS Blue Book, and in particular, its condition adjustment scale, which reduced the value of the vessel by 50 percent, he arrived at an estimate of \$300,000.00 based on an estimated fair market value of \$600,000.00 for an undamaged, well-maintained 2001 Sea Ray 510.⁶³

{¶45} Mr. Knox disagreed, testifying that the value of Plaintiff's vessel on July 15, 2004, was \$515,000.00. Mr. Knox's estimate, however, was based on nine comparable, but undamaged boats.⁶⁴ Although Mr. Knox testified that he would want to know the damage history of a boat before he purchased it because of the possibility that the damage could have life-threatening consequences, he asserted that "a properly repaired vessel does not suffer any loss in fair market value."⁶⁵ But Mr. Knox acknowledged that "All things being equal, with two otherwise identical boats side by side at the same price, the buyer would certainly pick the boat that had not been damaged."⁶⁶

{¶46} • On February 27, 2004, Plaintiff entered into a brokerage agreement with Jefferson Beach Yacht Sales, St. Claire Shores, Michigan, to sell the vessel.⁶⁷ Jefferson Beach sold the vessel for \$350,000.00.⁶⁸ Prior to the sale, Plaintiff offered to sell the vessel to Defendant at the same price and on the same terms and conditions as those offered to the

⁶² See Plaintiff's Proposed Findings of Fact & Conclusions of Law, at 10.

⁶³ Testimony of Gregory Group.

⁶⁴ Deposition of Steven A. Knox, at 85: 13-14.

⁶⁵ Deposition of Steven A. Knox, at 136: 9-11.

⁶⁶ Deposition of Steven A. Knox, at 138: 5-8.

⁶⁷ Plaintiff's Exhibit 16.

⁶⁸ See Defendant's Proposed Findings of Fact & Conclusions of Law, at 15 (the vessel was sold to World Wide Yachts, Inc.).

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prospective buyer.⁶⁹ Defendant refused, asserting that it was “not interested in purchasing [Plaintiff’s] boat for \$350,000.00 as reportedly had been offered to a third party.”⁷⁰

{¶47} • Between the time Plaintiff purchased the vessel on August 9, 2002, and the time it was sold to the third party on March 18, 2003, Plaintiff incurred the following costs and expenses:⁷¹

Heated Storage (9/20/02)	\$500.00
Canvas Replacement (9/20/02)	\$2,814.30
Dock Fee (2002)	\$1,000.00
Heated Storage (2002-2003, less 9/20/02 deposit)	\$5,743.40
Dock Fee (3/2/03)	\$4,505.00
Electricity (3/2/03)	\$350.00
Heated Storage (7/27/03)	\$500.00
Electricity (7/27/03)	\$350.00
Dock Fee (7/27/03)	\$2,703.00
Dock Fee (11/30/03)	\$2,703.00
Heated Storage (2003-2004, less 7/27/03 deposit)	\$5,743.00
Insurance	\$2,832.00
Sales commission (for sale on March 1, 2004)	\$24,500.00
Legal services expense for sale	\$2,148.75
TOTAL	\$54,439.44

Adding these expenses to the loss on the vessel, which is \$430,151.83 (\$780,151.83 - \$350,000.00), Plaintiff’s damages total \$484,591.27.

⁶⁹ Plaintiff’s Exhibit 26.

⁷⁰ Plaintiff’s Exhibit 27.

⁷¹ Plaintiff’s Exhibit 19 (summary), and Exhibit 23, 24 & 25 (receipts).

III. CONCLUSIONS OF LAW

{¶48} This Court finds that:

{¶49} • The CSPA, R.C. 1345.01, et seq., prohibits deceptive acts and practices in connection with a consumer transaction.

{¶50} • The CSPA is a remedial law which is designed to compensate for traditional consumer remedies and so must be liberally construed.

{¶51} • R.C. 1345.02(A) provides that “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.”

{¶52} • R.C. 1345.01(C) defines a “supplier” as including “a seller, lessor, assignor, franchisor, or other person engaged in the business of effecting or soliciting consumer transactions, whether or not he deals directly with the consumer.”

{¶53} • R.C. 1345.01(A) applies to “consumer transactions” which are defined to include “a sale * * * to an individual for purposes that are primarily personal, family, or household, or for solicitation to supply any of these things.”

{¶54} • A seller’s pre-sale misrepresentations about damages and repairs constitute violations of the CSPA.

{¶55} • R.C. 1345.02 makes actionable certain practices which it characterizes as deceptive.

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{¶56} • R.C. 1345.02 does not require either intent or knowledge on the part of the Defendant; rather, it is sufficient that the conduct complained of “has the likelihood of inducing in the mind of the consumer a belief which is not in accord with the facts.”⁷²

{¶57} • The presence of deception is determined by looking to the consumer’s state of mind and not the intent of the seller.

{¶58} • R.C. 1345.02 does not limit deceptive sales practices to pre-sale activity; a seller can also violate the CSPA after the sale.

{¶59} • R.C. 1345.09(B) provides that where there has been a violation of the CSPA, a consumer is entitled to “rescind the transaction or recover * * * three times the amount of his actual damages.”

{¶60} • R.C. 1345.09(B) requires an election of remedies and prohibits a trial court from awarding both rescission of a contract and treble damages.⁷³

{¶61} • A consumer must elect between the remedies of rescission or damages in pursuing a claim under the Consumer Sales Practices Act.

{¶62} • Any defect that shakes the buyer’s faith or undermines his confidence in the reliability and integrity of the purchased item is deemed to be a substantial impairment of the item’s value and provides a basis for revocation of the underlying sales agreement.

{¶63} • R.C. 1302.52 is applicable only where a buyer has rejected nonconforming goods, but not if the buyer has revoked acceptance.

⁷² *Funk v. Montgomery AMC/Jeep/Renault*, 66 Ohio App.3d 815, 823, quoting *Brown v. Bredenbeck* (C.P.1975), 2 O.O.3d 286, 287; see also, *Thomas v. Sun Furniture & Appliance Co.* (1978), 61 Ohio App.2d 78, 399 N.E.2d 567.

⁷³ See *Williams v. Banner Buick, Inc.* (1989), 60 Ohio App.3d 128, 131, 574 N.E.2d 579; *Frey v. Vin Devers* (1992), 80 Ohio App.3d 1, 7, 608 N.E.2d 796.

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{¶64} • A buyer may not revoke acceptance on the basis of trivial defects or defects which may easily be corrected.

{¶65} • One of the remedies available to a buyer is revocation of acceptance.

{¶66} • The test for revocation of acceptance is whether the defect substantially impairs the value of the goods to the buyer. This test is a subjective one and may be shown by loss of the buyers faith in the reliability and integrity of the purchased item.

{¶67} • The sale of an item is reasonable if the resale price reflects its actual value at the time of the purchase or exchange.

{¶68} • The measure of compensatory damages is determined by subtracting any amount the buyer received on resale of the item from the original purchase price, and adding to it all other actual damages proximately caused by the violation.

{¶69} • A consumer is entitled to recover all damages, including monetary injuries proximately caused” by the seller’s misrepresentations.

{¶70} • The CSPA provides that a buyer who has revoked his acceptance is also entitled to seek incidental and consequential damages.

{¶71} • R.C. 1302.86(B) provides that a “buyer may recover from the seller as damages * * * any incidental or consequential damages as defined in section 1302.89 of the Revised Code * * *.”

{¶72} • R.C. 1302.89 defines incidental damages as: “damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation, and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses,

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or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.”

{¶73} • R.C. 1302.89 defines consequential damages as damages resulting from the seller’s breach which include: “any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise.”

{¶74} • R.C. 1345.09(B) conditions the availability of treble damages upon a violation of the CSPA and a showing that the violation was an act or practice determined to violate R.C. 1345.02 or 1345.03 by a previous Ohio court decision, provided the decision had been made available for public inspection by the Attorney General pursuant R.C. 1345.05(A)(3) prior to the commission of the violation in question.

{¶75} • R.C. 1345.09 provides that there must be a violation of an act or practice “declared to be deceptive or unconscionable by rule * * *, or an act or practice determined by a court of this state to violate section 1345.02 or 1345.03 * * * and committed after the decision containing the determination has been made available for public inspection * * *.”

{¶76} • R.C. 1345.09 permits a consumer who has been the victim of deceptive acts or practices to choose between recession or treble damages.

{¶77} • The CSPA does not make it discretionary for a trial court to award either actual damages or treble damages.

{¶78} • Recovery under the CSPA is not limited to making the consumer whole.

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{¶79} • R.C. 1345.13 specifically provides that “[t]he remedies in sections 1345.01 to 1345.13 * * * are in addition to the remedies otherwise available for the same conduct under state or local law.”

{¶80} • The CSPA does not supersede or abrogate any common-law remedies already available to the consumer.

{¶81} • The CSPA does not supersede a consumer’s remedies under common law fraud, and if treble damages are awarded, punitive damages are not precluded.

{¶82} • A claim of common-law fraud requires proof of the following elements: (a) a representation or, where there is a duty to disclose, concealment of a fact, (b) which is material to the transaction at hand, (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (d) with the intent of misleading another into relying upon it, (e) justifiable reliance upon the representation or concealment, and (f) a resulting injury proximately caused by the reliance.

{¶83} • Deception or misrepresentation is not confined to spoken or written words but may encompass conduct that amounts to an assertion not in accordance with the truth.

{¶84} • Knowledge can be implied from the surrounding circumstances.

{¶85} • It is not necessary for the plaintiff to allege or prove that the defendant made the representation knowing that it was false.

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{¶86} • “In such an action it is not a defense for the defendant to assert that he made the representation without knowing whether it was true or false, if his statement was made under circumstances which implied knowledge on his part.”⁷⁴

{¶87} • The fundamental rule of tort law is that the owner must be compensated for the loss sustained.

{¶88} • A trial court does not err in awarding treble damages under R.C. 1345.09(B) and punitive damages for common law violations.

{¶89} • If punitive damages are proper, the plaintiff may also recover reasonable attorney fees.

{¶90} • Attorney fees may be awarded as an element of compensatory damages where punitive damages are warranted.

{¶91} • “It is an established principle of law in this state that punitive damages may be awarded in tort cases involving fraud, insult or malice.”⁷⁵

{¶92} • In establishing punitive damages, Courts must consider: (1) the degree of reprehensibility of the defendant’s misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages authorized by the jury or the court and the civil penalties authorized or imposed in comparable cases.⁷⁶

⁷⁴ *Pumphrey v. Quillen* (1956), 165 Ohio St. 343, 135 N.E.2d 328.

⁷⁵ *Columbus Finance, Inc. v. Howard* (1975), 42 Ohio St. 2d 178, 71 Ohio Op. 2d 174, 177, 327 N.E.2d 654, 658.

See *Roberts v. Mason* (1859), 10 Ohio St. 277; *Saberton v. Greenwald* (1946), 146 Ohio St. 414, 66 N. E. 2d 224.

⁷⁶ *BMW of North America, Inc. v. Gore* (1996), 517 U.S. 559; 116 S. Ct. 1589, 134 L. Ed. 2d 809, 1996 U.S. LEXIS 3390.

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{¶93} • An award of punitive damages is based upon an “application of law, rather than a decisionmaker’s caprice.”⁷⁷

{¶94} • It is presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant’s culpability is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.

{¶95} • Generally, awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree will satisfy due process.

{¶96} • The precise award in any case, must be based upon the facts and circumstances of the defendant’s conduct and the harm to plaintiff.

{¶97} • The compensatory damages awarded to Plaintiff under the CSPA include a punitive element, treble damages.

{¶98} • The legislature intended for the remedies available to the consumer in R.C. 1345.09 [CSPA] to be in addition to remedies already available such as damages for common-law fraud.

{¶99} • Because the CSPA does not supersede or abrogate any common-law remedy the consumer may have in addition to the statutory remedies available, treble damages under the statute and punitive damages may both be proper in appropriate cases.

⁷⁷ *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001), 532 U.S. 424; 121 S. Ct. 1678, 149 L. Ed. 2d 674, 2001 U.S. LEXIS 3520, citing *BMW of North America, Inc. v. Gore* (1996), 517 U.S. 559; 116 S. Ct. 1589, 134 L. Ed. 2d 809, 1996 U.S. LEXIS 3390.

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{¶100} • While States enjoy considerable discretion in deducing when punitive damages are warranted, each award must comport with the principles set forth in *BMW of North America, Inc. v. Gore*.⁷⁸

{¶101} • To be awarded punitive damages, a plaintiff must establish not only the elements of the tort itself but, in addition, must either show that the fraud is aggravated by the existence of malice or ill will, or must demonstrate that the wrongdoing is particularly gross or egregious.

{¶102} • A simple case of fraud or constructive fraud does not warrant the assessment of punitive damages.

{¶103} • In order to prove that punitive damages are appropriate, it must be shown that the fraud contained an element of malice or ill will, or that the wrongdoing is particularly gross or egregious.

{¶104} • In awarding punitive damages, the existence of conscious wrongdoing must be shown. Conscious wrongdoing is defined as conscious, deliberate or intentional and which requires the party to possess knowledge of the harm that might be caused by his behavior.

{¶105} • Malice may be inferred from conduct.

{¶106} • R.C. 1345.09(F)(2), provides that trial courts may award the prevailing plaintiff a “reasonable attorney’s fee” if “the supplier has knowingly committed an act or practice that violates the [CSPA].”

⁷⁸ *BMW of North America, Inc. v. Gore* (1996), 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809, 1996 U.S. LEXIS 3390. See *State Farm v. Campbell* (2003), 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585, 2003 U.S. LEXIS 2713.

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{¶107} • R.C. 1345.01(E) defines “knowledge” as “* * * actual awareness, but such actual awareness may be inferred where objective manifestations indicate that the individual involved acted with such awareness.”

{¶108} • The conduct complained of must violate the CSPA. The statutory language does not state that the supplier must act with the knowledge that his acts violate the law.

{¶109} • R.C. 1345.09(F)(2) permits courts to award reasonable attorney fees where the defendant committed an act or practice with was deceptive, unfair or unconscionable.⁷⁹

{¶110} • “[t]he most useful starting point for determining the amount of a fee award is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate,”⁸⁰ the United States Supreme Court emphasized that “[t]his calculation provides an objective basis on which to make an initial estimate of the value of a lawyer’s services.”⁸¹

{¶111} • R.C. 1345.09(F)(2) limits the fee award to work reasonably performed.

{¶112} • Courts may modify the amount of attorney fees upward or downward by application of the various factors listed in DR 2-106(B), which include: “the time and labor involved in maintaining the litigation; the novelty and difficulty of the questions involved; the professional skill required to perform the necessary legal services; the attorney's inability to accept other cases; the fee customarily charged; the amount involved and the results obtained;

⁷⁹ See Roberts and Martz, “Consumerism Comes of Age: Treble Damages and Attorneys Fees in Consumer Transactions - The Ohio Consumer Sales Practices Act,” 42 Ohio St. L.J. 927, at 957 (1981).

⁸⁰ *Bittner v. Tri-County Toyota, Inc.* (1991), 58 Ohio St. 3d 143, 569 N.E.2d 464, quoting *Hensley v. Eckerhart* (1983), 461 U.S. 424, 433, 103 S. Ct. 1933, 76 L. Ed. 2d 40.

⁸¹ *Bittner v. Tri-County Toyota, Inc.* (1991), 58 Ohio St. 3d 143, 569 N.E.2d 464, quoting *Hensley v. Eckerhart* (1983), 461 U.S. 424, 433, 103 S. Ct. 1933, 76 L. Ed. 2d 40.

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any necessary time limitations; the nature and length of the attorney/client relationship; the experience, reputation, and ability of the attorney; and whether the fee is fixed or contingent.”⁸²

{¶113} • Trial courts should award fees only for the amount of time spent pursuing the claim for which fees may be awarded.

{¶114} • Courts may treat as reasonably expended hours, only those claims that arise from a common core of facts and related legal theories if the plaintiff has prevailed on any of those claims.

{¶115} • In considering the reasonableness of the fees expended by the plaintiff, courts may rely on its observation of the quality and quantity of the services rendered before it.

{¶116} • Trial courts are in the best position to determine the value of services rendered before it.

{¶117} • In fashioning an award that properly reflects the work “reasonably performed,” trial courts should consider the standards set forth by Ohio Courts and should not set the award so high or low “as to shock the conscience” of a reviewing court.⁸³

IV. ANALYSIS

{¶118} In the case *sub judice*, Plaintiff seeks to hold the Defendant responsible for damages under the CSPA and common law fraud, but asserts that he would be satisfied “with the

⁸² *Cremeans v. Robbins*, 4th Dist. No. 99 CA 2520, 2000 Ohio App. LEXIS 2753. See *Bittner v. Tri-County Toyota, Inc.* (1991), 58 Ohio St. 3d 143, 145, 569 N.E.2d 464

⁸³ *Bittner v. Tri-County Toyota, Inc.* (1991), 58 Ohio St. 3d 143, 146, 569 N.E.2d 464, quoting *Brooks v. Hurst Buick-Pontiac-Olds-GMC, Inc.* (1985), 23 Ohio App. 3d 85, 91, 491 N.E.2d 345. See R.C. 1345.09(F)(2).

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damages flowing from a CSPA violation if trebled.”⁸⁴ It is well settled that proof of intent to deceive is not required to establish a violation of the CSPA, but that intent is required to support a claim of fraud.

{¶119} Here, the issues presented to this Court are whether Defendant violated the CSPA by engaging in deceptive acts and practices in connection with the sale of the vessel to Plaintiff, and whether Defendant engaged in fraud and deception, intentionally misleading Plaintiff as to the severity of the damages to the vessel, including whether the fraud complained of is “aggravated by the existence of malice or ill will,” or that the wrongdoing is “particularly gross or egregious.”⁸⁵

A. Defendant Violated the Ohio Consumer Sales Practices Act

{¶120} The Ohio Consumer Sales Practices Act (“CSPA”), R.C. 1345.01, et seq., prohibits deceptive acts and practices in connection with a consumer transaction. In *Einhorn v. Ford Motor Co.*,⁸⁶ the Ohio Supreme Court held the CSPA to be “a remedial law which is designed to compensate for traditional consumer remedies and so must be liberally construed pursuant to R.C. 1.11.” In *Thomas v. Sun Furniture*,⁸⁷ the First Appellate Court emphasized that “The Uniform Consumer Sales Practices Act, upon which the Ohio statute is modeled, states, in part, that the Act is to be construed * * * to protect consumers from suppliers who commit

⁸⁴ Plaintiff’s Proposed Findings of Fact & Conclusions of Law, at 24.

⁸⁵ *Combs Trucking, Inc. v. Internatl. Harvester Co.* (1984), 12 Ohio St. 3d 241, 466 N.E.2d 883, 1984 Ohio LEXIS 1204, citing *Logsdon v. Graham Ford Co.* (1978), 54 Ohio St.2d 336, 339, 8 O.O.3d 349, 351, 376 N.E.2d 1333. See *Mid-America Acceptance Co. v. Lightle* (1989), 63 Ohio App.3d 590, 579 N.E.2d 721.

⁸⁶ *Einhorn v. Ford Motor Co.* (1990), 48 Ohio St.3d 27, 29, 19, 548 N.E.2d 933, 1990 Ohio LEXIS 19.

⁸⁷ *Thomas v. Sun Furniture & Appliance Co.* (1978), 61 Ohio App.2d 78, 399 N.E.2d 567.

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deceptive and unconscionable sales practices;” and “* * * to encourage the development of fair consumer sales practices; * * *.”⁸⁸ Similarly, the Court in *Garner v. Borcharding Buick, Inc.*,⁸⁹ found that the “* * * Ohio Consumer Sales Practices Act was designed to protect consumers damaged by a supplier’s deceptive practices which occur in connection with consumer transactions.”⁹⁰

{¶121} The preface to the staff report of the Ohio Legislative Service Commission states: “Deception is the classic consumer problem. From an early time the law has provided remedies for the buyer who has been deceived. As marketing and consumer services have become more complex, the private remedies of the common law, and traditional criminal actions, have become relatively ineffective as a means by which the consumer may protect himself, and government has intervened.” Acknowledging that “‘fraud’ connotes the common law concept in which one must prove that the seller intended to deceive the buyer,” the Commission noted that “‘Deception’ is a much broader term in which the issue of the seller’s intent is avoided.”⁹¹ As such, the First Appellate Court in *Thomas* noted that the very reason for the enactment of the Consumer Sales Practices Act “was to give the consumer protection from a supplier’s deceptions which he lacked under the common law requirement of proof of [] intent to deceive in order to establish fraud,” holding that “[t]o require proof of intent would effectively emasculate the act and contradict its fundamental purpose.”⁹²

⁸⁸ 7A Uniform Laws Anno. 3, Uniform Consumer Sales Practices Act, Section 1 (1978).

⁸⁹ *Garner v. Borcharding Buick, Inc.* (1992), 84 Ohio App.3d 61, 616 N.E.2d 283, 1992 Ohio App. LEXIS 6011.

⁹⁰ See *Weaver v. J.C. Penney Co.* (1977), 53 Ohio App.2d 165, 6 O.O.3d 270, 372 N.E.2d 633.

⁹¹ Ohio Legislative Service Commission, Report No. 102, Fraud, Deception and Other Abuses in Consumer Sales and Services (1971).

⁹² *Thomas v. Sun Furniture & Appliance Co.* (1978), 61 Ohio App.2d 78, 399 N.E.2d 567.

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{¶122} Under the CSPA, R.C. 1345.02(A) provides that “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.” A “supplier” is defined by R.C. 1345.01(C), as including “a seller, lessor, assignor, franchisor, or other person engaged in the business of effecting or soliciting consumer transactions, whether or not he deals directly with the consumer.” Further, a “supplier” includes “those who engage in the business of effecting consumer transactions, whether or not they deal directly with the consumer.”⁹³ Moreover, R.C. 1345.01(A) applies to “consumer transactions” which are defined to include “a sale * * * to an individual for purposes that are primarily personal, family, or household, or for solicitation to supply any of these things.” Here, Plaintiff is an “individual” and was engaged in an activity, the purpose of which was “primarily personal, family or household,” at the time of the purchase of the vessel. Defendant is a boat distributor, engaged in consumer transactions, including the sale of boats or other vessels to individuals and consumers. Thus, having found that Plaintiff is a consumer, and that Defendant is a supplier as defined by R.C. 1345.01, et. seq., this Court must then examine whether Defendant’s pre-sale misrepresentations about damages and repairs violated the CSPA.

{¶123} In the case *sub judice*, Plaintiff asserts that Defendant misrepresented how the vessel was wrecked, the nature and extent of the damage, who repaired the vessel, and whether the vessel met factory specifications at the time of the sale. Further, Plaintiff alleges that he relied upon these representations in making his decision to purchase the vessel. In particular, Plaintiff asserts that he was not told that the vessel had been grounded hard and had sustained

⁹³ *Garner v. Borcharding Buick, Inc.* (1992), 84 Ohio App.3d 61, 616 N.E.2d 283, 1992 Ohio App. LEXIS 6011.

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severe structural damage. Nor was he told that extensive repairs had been made to the vessel, including its stringer system or that the vessel had been repaired twice, at a cost of \$98,662.28. Thus, this Court must determine whether Defendant's misrepresentations induced plaintiff to purchase the vessel.

{¶124} Ohio Courts have held that a seller's pre-sale misrepresentations about damages and repairs constitute violations of the CSPA.⁹⁴ R.C. 1345.02 makes actionable certain practices which it characterizes as deceptive. A violation of R.C. 1345.02 does not require either intent or knowledge on the part of the Defendant; rather, it is sufficient that the conduct complained of "has the likelihood of inducing in the mind of the consumer a belief which is not in accord with the facts."⁹⁵ As the Twelfth Appellate Court in *Thompson v. Jim Dixon Lincoln Mercury, Inc.*,⁹⁶ stated, "* * * [I]t is clear that the basic test is one of fairness as the act need not rise to the level of fraud, negligence or breach of contract," and "[t]he place to look to determine the presence of deception is the state of mind of the consumer and not the intent of the supplier."⁹⁷

{¶125} It is uncontroverted that the damage to the vessel was not readily visible because it was in the water at the time it was viewed by the Plaintiff. It is also uncontroverted that Defendant, both implicitly and explicitly, held out the vessel to have sustained only minor, non-

("privity of contract is not a prerequisite to the recovery of damages.")

⁹⁴ *Altman v. Southwyck AMC-Jeep-Renault, Inc.* (1991), 76 Ohio App.3d 92, 601 N.E.2d 122, 1991 Ohio App. LEXIS 5103.

⁹⁵ *Funk v. Montgomery AMC/Jeep/Renault* (1990), 66 Ohio App.3d 815, 823, quoting *Brown v. Bredenbeck* (C.P.1975), 2 O.O.3d 286, 287; see, also, *Thomas v. Sun Furniture & Appliance Co.* (1978), 61 Ohio App.2d 78, 399 N.E.2d 567.

⁹⁶ *Thompson v. Jim Dixon Lincoln Mercury, Inc.*, 12th Dist. No 82-11-0109, 1983 Ohio App. LEXIS 11955. See *Funk v. Montgomery AMC/Jeep/Renault* (1990), 66 Ohio App.3d 815.

⁹⁷ See Roberts and Martz, "Consumerism Comes of Age: Treble Damages and Attorneys Fees in Consumer Transactions - The Ohio Consumer Sales Practices Act," 42 Ohio St. L.J. 927, at 934 (1981).

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structural damage.⁹⁸ Thus, on acceptance, Plaintiff took possession of the vessel without discovery of its nonconformity both because discovery was difficult and because Plaintiff relied on Defendant's assurances that the damages were minor.

{¶126} Plaintiff testified that he believed Mr. Walker's representation that the vessel had sustained only cosmetic damage to the starboard side when it "hit a can."⁹⁹ Although Plaintiff was informed that the repairs had been performed by the factory, and that Sea Ray was offering a six month extended warranty on the vessel, Plaintiff testified that his purchase was conditioned upon being able to speak with Mr. Oreskovich, the service manager for MarineMax of Ohio, Inc., about the vessel. Acknowledging that the vessel had been "hit pretty hard," Mr. Oreskovich assured Plaintiff that the "boat is in great shape, it's fixed."¹⁰⁰ However, Mr. Oreskovich failed to inform Plaintiff that the vessel had actually been run aground on a reef, sustaining severe structural damage to its stringer system, asserting that Plaintiff had not "*ask[ed] the right questions.*"¹⁰¹ Nor did Mr. Oreskovich specifically inform Plaintiff that the additional repairs performed on the vessel by Atlantic Boat Repair, Inc., was a result of inadequate factory repairs that had failed to remedy *the separation of fiberglass from the stringer system.*

{¶127} Additionally, the Disclosure Acknowledgment signed by Plaintiff did not set forth the critical facts that (1) the vessel had been run aground hard upon a reef, (2) that it had sustained severe structural damage to its stringer system, (3) that it was repaired twice, once at the factory and once by Atlantic Boat Repair, or (4), the total cost of repairs to the vessel, all of which would have put Plaintiff on notice that additional investigation would be appropriate.

⁹⁸ See *Brooks v. Hurst Buick-Pontiac-Olds-GMC, Inc.* (1985), 23 Ohio App.3d 85, 89, 153, 491 N.E.2d 345, 350.

⁹⁹ Testimony of Douglas G. Borrer.

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Moreover, Plaintiff's reliance upon the Disclosure Agreement was based in part upon his past dealings with Mr. Oreskovich, and his belief that Mr. Oreskovich was "an honest guy."¹⁰² As a result of Mr. Walker's and Mr. Oreskovich's representations, Plaintiff made the decision to purchase the vessel. Thus, Defendant's failure to disclose the structural damage to the vessel, including the extent of this damage was a deceptive act.

{¶128} Additionally, deceptive sales practices prohibited by R.C. 1345.02 are not limited to pre-sale activity; a seller can also violate the CSPA after the sale.¹⁰³ Upon discovering the extent of the damage to the vessel, Plaintiff revoked his acceptance of the vessel and demanded rescission. R.C. 1345.09(B) provides that where there has been a violation of the Consumer Sales Practices Act a consumer is entitled to "rescind the transaction or recover * * * three times the amount of his actual damages." R.C. 1345.09(B) requires an election of remedies and prohibits a trial court from awarding both rescission of a contract and treble damages.¹⁰⁴ In *Brenner Marine, Inc. v. Goudreau, Jr.*,¹⁰⁵ the Sixth Appellate Court stated "it is well settled that a consumer must elect between the remedies of rescission [sic] or damages in pursuing a claim under the Consumer Sales Practices Act."¹⁰⁶

¹⁰⁰ Testimony of Karl Oreskovich.

¹⁰¹ Testimony of Karl Oreskovich.

¹⁰² Testimony of Douglas G. Borrer.

¹⁰³ See *Kuhn v. Tracy* (Jan. 26, 1995), Muskingum C.P. No. CH-94-0972, *Price v. Humphries Auto City* (Nov. 26, 1990), New Philadelphia M.C. No. 7-89-CVE-243.

¹⁰⁴ See *Williams v. Banner Buick, Inc.* (1989), 60 Ohio App.3d 128, 131, 574 N.E.2d 579; *Frey v. Vin Devers* (1992), 80 Ohio App.3d 1, 7, 608 N.E.2d 796.

¹⁰⁵ *Brenner Marine, Inc. v. Goudreau, Jr.*, 6th Dist. No. L-93-077, 1995 Ohio App. LEXIS 62.

¹⁰⁶ See *Williams v. Banner Buick, Inc.* (1989), 60 Ohio App.3d 128, 131, 574 N.E.2d 579; *Frey v. Vin Devers* (1992), 80 Ohio App.3d 1, 7, 608 N.E.2d 796.

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{¶129} Thus, the next question is whether the nonconformity substantially impaired the value of the merchandise “to the buyers.”¹⁰⁷ In *McCullough v. Bill Swad Chrysler-Plymouth, Inc.*,¹⁰⁸ the Ohio Supreme Court held that “Whether a complained of nonconformity substantially impairs an item’s worth to the buyer is a determination exclusively within the purview of the fact-finder * * *. Any defect that shakes the buyer’s faith or undermines his confidence in the reliability and integrity of the purchased item is deemed to work a substantial impairment of the item’s value and to provide a basis for revocation of the underlying sales agreement.” Concurring, the Sixth Appellate Court in *Altman v. Southwyck AMC-Jeep-Renault, Inc.*,¹⁰⁹ observed that “the extent of this damage and the success of its repair were not discernable without dismantling the truck,” and that “there was no way to be sure that the dealer’s repair was proper.” Based on this evidence, the Court found that it was not unreasonable “* * * to find that appellants’ confidence in the reliability and integrity of the vehicle was impaired, resulting in a substantial impairment of the value of the vehicle * * *.”¹¹⁰

{¶130} Emphasizing that he believed the integrity of the vessel to be compromised, Plaintiff asserted that he would never have bought that boat if he had known it was so badly damaged. The stringer system of the vessel is a significant component of the vessel and as such, is the essence of Plaintiff’s confidence in the vessel. Under such circumstances, Plaintiff’s

¹⁰⁷ See *Altman v. Southwyck AMC-Jeep-Renault, Inc.* (1991), 76 Ohio App.3d 92, 601 N.E.2d 122, 1991 Ohio App. LEXIS 5103.

¹⁰⁸ *McCullough v. Bill Swad Chrysler-Plymouth, Inc.* (1983), 5 Ohio St.3d 181, 186, 403, 449 N.E.2d 1289, 1294.

¹⁰⁹ *Altman v. Southwyck AMC-Jeep-Renault, Inc.* (1991), 76 Ohio App.3d 92, 601 N.E.2d 122, 1991 Ohio App. LEXIS 5103.

¹¹⁰ *Altman v. Southwyck AMC-Jeep-Renault, Inc.* (1991), 76 Ohio App.3d 92, 601 N.E.2d 122, 1991 Ohio App. LEXIS 5103.

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revocation is justified.¹¹¹ Thus, Defendant's refusal to accept Plaintiff's revocation is an additional violation of the CSPA.

{¶131} In asserting that it should have been permitted to cure any defects in the vessel, Defendant misapplies the holding of the United States District Court for the Northern District of Ohio in *Abele v. Bayliner Marine Corp.*,¹¹² which stated, "On the other hand, the buyer may not revoke acceptance on the basis of trivial defects or defects which may easily be corrected."¹¹³ However, the Court observed that one of the remedies available to a buyer is revocation of acceptance, stating, "[t]he threshold test for revocation of acceptance is whether the defect substantially impairs the value of the goods to the buyer,"¹¹⁴ and that "[t]he test is a subjective one, and may be met by showing that the nonconformities undermine the buyer's faith in the integrity and reliability of a vehicle purchased by him."¹¹⁵ The fact that the vessel was seriously damaged is not a trivial defect that may easily be cured, particularly when the extent of the damage to the stringer system cannot be conclusively determined¹¹⁶

{¶132} Moreover, a majority of courts have held that the seller does not have the right to cure under R.C. 1302.52 when the buyer revokes acceptance because the statute only provides

¹¹¹ *Ascioll v. Mantor Oldsmobile-Pontiac, Inc.* See *Orange Motors of Coral Gables v. Dade Co. Dairies*, 258 So. 2d 319 (Fla. App. 1972); *Tiger Motor Company v. McMurtry*, 284 Ala. 283, 224 So. 2d 638 (1969); *Moore v. Howard Pontiac-American, Inc.*, 492 S.W.2d 227 (Tenn. Ct. App. 1972), cert. denied, 492 S.W.2d 227 (Tenn. 1973); see *Nadeau v. Irwin Motors*, 102 N.H. 212, 153 A.2d 791 (1959); *Simpson v. Simmons*, 114 N.H. 690, 693, 327 A.2d 708, 710 (1974).

¹¹² *Abele v. Bayliner Marine Corp.* (N.D. Ohio, 1997), 11 F.Supp.2d 955, 1997 U.S. Dist. LEXIS 22675.

¹¹³ *Pratt v. Winnebago Indus., Inc.*, 463 F. Supp. 709, 714 (W.D. Pa. 1979).

¹¹⁴ See R.C. 1302.66(A).

¹¹⁵ *McCullough v. Bill Swad Chrysler-Plymouth, Inc.*, 5 Ohio St. 3d 181, 186, 449 N.E.2d 1289, 1294 (1983).

¹¹⁶ See *Pratt v. Winnebago Indus., Inc.*, 463 F. Supp. 709, 714 (W.D. Pa. 1979).

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for the seller's right to cure "only after a buyer has rejected non-conforming goods."¹¹⁷ Courts have generally held that the seller's right to cure under Section 2-508 of the Uniform Commercial Code (codified as R.C. 1302.52 in Ohio) is applicable only where a buyer has rejected nonconforming goods and that the right to cure does not attach where a buyer has revoked acceptance.¹¹⁸ Here, it is not necessary to address the issue of whether a seller under R.C. 1302.52 has a right to cure after a buyer has revoked acceptance because it is undisputed that Plaintiff revoked his acceptance of the vessel and that Defendant refused to accept Plaintiff's revocation. Thus, Defendant does not have a right to cure as provided in R.C. 1302.52.¹¹⁹

{¶133} Although Mr. Knox conceded that he could not "tell conclusively, based upon a visual examination of these stringers from the bulkhead looking 18 inches, whether there is any disruption of the attachment of that stringer to the hull," and that "the only way to be 100-percent certain that those stringers aren't damaged is to see them," he asserted that based on his "inspection and my experience, within a reasonable degree of engineering certainty, that there is no damage forward of that bulkhead," arguing that while "I cannot tell you conclusively whether the sun is shining outside today, but I have reasonable expectations based on what I've done before. And that's the same case here."¹²⁰ Yet, Mr. Knox acknowledged it is impossible to ascertain whether there was any damage to the area forward of the bulkhead.¹²¹

¹¹⁷ *Brenner Marine, Inc. v. Goudreau, Jr.*, 6th Dist. No. L-93-077, 1995 Ohio App. LEXIS 62.; *Zion Temple First Pentecostal Church of Cincinnati, Ohio, Inc. v. Brighter Day Bookstore & Gifts*, 1st Dist. No. C-030762, 2004 Ohio 5499, 2004 Ohio App. LEXIS 5043.

¹¹⁸ Wright & Summers, Uniformed Commercial Code (1988), 425, Section 8-5.

¹¹⁹ See *Zion Temple First Pentecostal Church of Cincinnati, Ohio, Inc. v. Brighter Day Bookstore & Gifts*, 1st Dist. No. C-030762, 2004 Ohio 5499, 2004 Ohio App. LEXIS 5043.

¹²⁰ Deposition of Steven A. Knox, at 160: 7-11.

¹²¹ See Deposition of Steven A. Knox, at 155:9-17.

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{¶134} Defendant also argues that the vessel was not sold in a commercially reasonable manner because the resale price of the vessel was not “reflective of the boat’s fair market resale value.”¹²² However, the record before the Court reflects that Defendant was offered the opportunity to purchase the vessel for the same price and under the same terms being offered to the third party buyer. Mr. Knox testified that the value of Plaintiff’s vessel on July 15, 2004, was \$515,000, based on nine comparable, but undamaged boats. Although Mr. Knox testified that he would want to know the damage history of a boat before he purchased it because of the possibility that the damage could have life-threatening consequences, he asserted that “a properly repaired vessel does not suffer any loss in fair market value.”¹²³ But Mr. Knox conceded that “All things being equal, with two otherwise identical boats side by side at the same price, the buyer would certainly pick the boat that had not been damaged.”¹²⁴ Thus, this Court finds that Plaintiff’s sale of the vessel was reasonable, and that the resale price of the vessel reflects its actual value “at the time of the purchase or exchange.”¹²⁵

1) Defendant is Entitled to Treble Damages Under the CSPA

{¶135} As a result of Defendant’s violations of chapter 1345, Plaintiff has a cause of action and is entitled to recover three times the amount of his actual damages. The measure of compensatory damages is determined by subtracting any amount the buyer received on resale of

¹²² Defendant’s Findings of Fact & Conclusions of Law, at 22.

¹²³ Deposition of Steven A. Knox, at 136: 9-11.

¹²⁴ Deposition of Steven A. Knox, at 138: 5-8.

¹²⁵ *Starinki v. Pace* (1987), 41 Ohio App.3d 200. See 51 Ohio Jurisprudence 3d (1984) 75, Fraud and Deceit, Section 215.

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the item from the original purchase price, and adding to it all other actual damages proximately caused by the violation.

{¶136} In *Eckert v. Tony Lariche Chevrolet*,¹²⁶ the Eighth Appellate Court held that the consumer was entitled to recover all damages, including monetary injuries “proximately caused” by the dealership’s misrepresentations. The *Eckert* Court found that “if Eckert had known the truck’s history, particularly its engine problems, he would not have purchased the truck and incurred any of the repairs.”¹²⁷ Similarly, this Court finds that had Plaintiff been aware of the structural damage to the vessel, he would not have purchased the vessel and incurred any of the related expenses.¹²⁸

{¶137} In *Brenner Marine, Inc.*,¹²⁹ the Court noted that the CSPA provides that a buyer who has revoked his acceptance is also entitled to seek incidental and consequential damages. Both R.C. 1302.85 and 1302.86 provide a buyer who has justifiably revoked acceptance with certain remedies. Specifically, R.C. 1302.86(B) provides that a “buyer may recover from the seller as damages * * * any incidental or consequential damages as defined in section 1302.89 of the Revised Code * * *.” R.C. 1302.89 defines incidental damages as: “damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation, and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses, or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.” And R.C. 1302.89 defines consequential damages as

¹²⁶ *Eckert v. Tony Lariche Chevrolet*, 8th Dist. No. 60429, 1992 Ohio App. LEXIS 2587.

¹²⁷ *Eckert v. Tony Lariche Chevrolet*, 8th Dist. No. 60429, 1992 Ohio App. LEXIS 2587.

¹²⁸ See e.g., *Eckert v. Tony Lariche Chevrolet*, 8th Dist. No. 60429, 1992 Ohio App. LEXIS 2587; *Kuhn v. Tracy* (Jan. 26, 1995), Muskingum C.P. No. CH-94-0972.

¹²⁹ *Brenner Marine, Inc. v. Goudreau, Jr.*, 6th Dist. No. L-93-077, 1995 Ohio App. LEXIS 62.

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damages resulting from the seller's breach which include: "any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise." Here, Plaintiff has incurred expenses related to the storage, maintenance and sale of the vessel.

{¶138} Plaintiff purchased the vessel from Defendant for \$780,151.83 on August 9, 2002, and later sold it through a brokerage agreement with Jefferson Beach Yacht Sales for \$350,000.00 on March 18, 2003. Plaintiff incurred other expenses related to the vessel which were proximately caused by Defendant's misrepresentations in an amount of \$54,439.44.¹³⁰ Thus, Plaintiff's actual damages total \$484,404.47.

{¶139} Pursuant to R.C. 1345.09, where the damages suffered by a consumer result from conduct prohibited by a prior court decision that was part of the Attorney General's public inspection file, the consumer is entitled to treble damages. In *Hahn v. Doe*,¹³¹ the Tenth Appellate Court explained, "R.C. 1345.09(B) conditions the availability of treble damages upon a violation of R.C. 1345.02 or 1345.03 and a showing that the violation was * * * [either (1) an act or practice declared to be deceptive or unconscionable by a rule adopted by the Attorney General pursuant to R.C. 1345.05(B)(2) prior to the commission of the violation in question, or (2)] an act or practice determined to violate R.C. 1345.02 or 1345.03 by a previous Ohio court decision, provided the decision had been made available for public inspection by the Attorney General pursuant R.C. 1345.05(A)(3) prior to the commission of the violation in question."¹³²

¹³⁰ Plaintiff's Exhibit 19 (summary), and Exhibit 23, 24 & 25 (receipts). See ¶ 47 above.

¹³¹ *Hahn v. Doe*, 10th Dist. No. 94APE07-1024, 1995 Ohio App. LEXIS 1057.

¹³² See *Mid-America Acceptance Co. v. Lightle* (1989), 63 Ohio App.3d 590, 579 N.E.2d 721; *Sinkfield v. Strong* (1987), 34 Ohio Misc.2d 19, 21, 517 N.E.2d 1051.

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{¶140} As R.C. 1345.09 provides, there must be a violation of an act or practice “declared to be deceptive or unconscionable by rule * * *, or an act or practice determined by a court of this state to violate section 1345.02 or 1345.03 * * * and committed after the decision containing the determination has been made available for public inspection * * *.”

{¶141} In *Stulz v. Artistic Pools, Inc.*,¹³³ the Ninth Appellate Court noted that “[a] consumer who has been the victim of deceptive acts or practices may choose between recession or treble damages. In *Armstrong v. Kittinger*,¹³⁴ the Ninth Appellate Court emphasized that “[T]he statute does not make it discretionary for a trial court to award either actual damages or treble damages.” Thus, as the Court in *Stulz*,¹³⁵ held, “[r]ecoverly under the CSPA * * * is not limited to making the consumer whole.”¹³⁶ Nor is the trial court free to “exercise its sound discretion in fashioning a remedy appropriate to the facts.”¹³⁷ Here, Plaintiff is seeking treble damages under the CSPA.

{¶142} This Court finds that the prerequisites for treble damages were met. First, this Court found that Defendant violated the CSPA. Defendant’s failure to disclose the structural damage to the vessel, including the extent of this damage was a deceptive act. As well, Defendant’s refusal to accept Plaintiff’s revocation of the vessel was an additional violation. Second, Defendant’s acts or practices were determined to violate R.C. 1345.02 or 1345.03 by a previous Ohio court decision, and these decisions have been made available for public inspection by the Attorney General pursuant to R.C. 1345.05(A)(3) prior to the commission of the violation in question. The Ohio court decisions that the Attorney General has made available for public

¹³³ *Stulz v. Artistic Pools, Inc.*, 9th Dist. No. 20189, 2001 Ohio 1420, 2001 Ohio App. LEXIS 4561.

¹³⁴ *Armstrong v. Kittinger*, 9th Dist. Nos. 16124, 16378, 1994 Ohio App. LEXIS 4465.

¹³⁵ *Stulz v. Artistic Pools, Inc.*, 9th Dist. No. 20189, 2001 Ohio 1420, 2001 Ohio App. LEXIS 4561.

¹³⁶ *Stulz v. Artistic Pools, Inc.*, 9th Dist. No. 20189, 2001 Ohio 1420, 2001 Ohio App. LEXIS 4561.

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inspection and upon which this Court has relied in this matter include: *Altmann v. Southwyck AMC/Jeep/Renault, Inc.*;¹³⁸ *Armstrong v. Kittinger*;¹³⁹ *Bittner v. Tri-County Toyota, Inc.*;¹⁴⁰ *Brenner Marine, Inc. v. Goudreau, Jr.*;¹⁴¹ *Eckert v. Tony Lariche Chevrolet*;¹⁴² *Einhorn v. Ford Motor Co.*;¹⁴³ *Gardner v. Borcharding Buick, Inc.*;¹⁴⁴ *Kuhn v. Tracy*;¹⁴⁵ *Price v. Humphries Auto City*;¹⁴⁶ *McCullough v. Bill Swad Chrysler-Plymouth, Inc.*;¹⁴⁷ *Mid-America Acceptance Co. v. Lightle*;¹⁴⁸ *Thomas v. Sun Furniture & Appliance Co.*¹⁴⁹

{¶143} As well, this Court has considered, but not specifically referenced the following Ohio court decisions the Attorney General has made available for public inspection and upon which this Court has considered in this matter, which are also part of the Attorney General's public inspection file: *Andrews v. Scott Pontiac/Caddillac/GMC, Inc.*;¹⁵⁰ *Arales v. Furs By Weiss, Inc.*;¹⁵¹ *Couto v. Gibson*;¹⁵² *Ford v. Brewer*;¹⁵³ *Karst v. Goldberg*;¹⁵⁴ *Manning v. Len Immke Buick*;¹⁵⁵ and *Meade v. Nelson Auto Group*.¹⁵⁶

¹³⁷ See *Bierlein v. Alex's Continental Inn, Inc.* (1984), 16 Ohio App.3d 294, 301, 475 N.E.2d 1273.

¹³⁸ *Altman v. Southwyck AMC-Jeep-Renault, Inc.* (1991), 76 Ohio App.3d 92, 601 N.E.2d 122, 1991 Ohio App. LEXIS 5103.

¹³⁹ *Armstrong v. Kittinger*, 9th Dist. No. 16124, 16378, 1994 Ohio App. LEXIS 4465.

¹⁴⁰ *Bittner v. Tri-County Toyota, Inc.* (1991), 58 Ohio St. 3d 143, 146, 569 N.E.2d 464

¹⁴¹ *Brenner Marine, Inc. v. Goudreau, Jr.*, 6th Dist. No. L-93-077, 1995 Ohio App. LEXIS 62.

¹⁴² *Eckert v. Tony Lariche Chevrolet*, 8th Dist. No. 60429, 1992 Ohio App. LEXIS 2587.

¹⁴³ *Einhorn v. Ford Motor Co.* (1990), 48 Ohio St.3d 27, 29, 19, 548 N.E.2d 933, 1990 Ohio LEXIS 19.

¹⁴⁴ *Garner v. Borcharding Buick, Inc.* (1992), 84 Ohio App.3d 61, 616 N.E.2d 283, 1992 Ohio App. LEXIS 6011.

¹⁴⁵ *Kuhn v. Tracy* (Jan. 26, 1995), Muskingum C.P. No. CH-94-0972,

¹⁴⁶ *Price v. Humphries Auto City* (Nov. 26, 1990), New Philadelphia M.C. No. 7-89-CVE-243.

¹⁴⁷ *McCullough v. Bill Swad Chrysler-Plymouth, Inc.* (1983), 5 Ohio St.3d 181, 186, 403, 449 N.E.2d 1289, 1294.

¹⁴⁸ *Mid-America Acceptance Co. v. Lightle* (1989), 63 Ohio App.3d 590, 579 N.E.2d 721.

¹⁴⁹ *Thomas v. Sun Furniture & Appliance Co.* (1978), 61 Ohio App.2d 78, 399 N.E.2d 567.

¹⁵⁰ *Andrews v. Scott Pontiac/Caddillac/GMC, Inc.*

¹⁵¹ *Arales v. Furs By Weiss, Inc.*, 8th Dist. No. 81603, 2003 Ohio 3344, 2003 Ohio App. LEXIS 2982.

¹⁵² *Couto v. Gibson*, 4th Dist. Nos. Nos. 1409, 1412, 67 Ohio App. 3d 407, 587 N.E.2d 336, 1990 Ohio App. LEXIS 1629.

¹⁵³ *Ford v. Brewer*, 10th Dist. No. No. 86AP-626, 1986 Ohio App. LEXIS 9790.

¹⁵⁴ *Karst v. Goldberg*, 10th Dist. No. No. 92AP-1480, 88 Ohio App. 3d 413, 623 N.E.2d 1348, 1993 Ohio App. LEXIS 3401.

¹⁵⁵ *Manning v. Len Immke Buick*, 10th Dist. No. No. 10005, Court of Appeals of Ohio, 28 Ohio App. 2d 203, 276 N.E.2d 253, 1971 Ohio App. LEXIS 468.

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{¶144} Having found that Defendant engaged in an unfair or deceptive act determined to violate R.C. 1345.02 or 1345.03 by a previous Ohio court decision, and these decisions have been made available for public inspection by the Ohio Attorney General pursuant to R.C. 1345.05(A)(3) prior to the commission of the violation in question, Plaintiff is entitled treble damages in the amount of \$1,459,213.41.

B. Defendant Engaged in Fraud and Deception, Intentionally Misleading Plaintiff as to the Severity of the Damage to the Vessel

{¶145} Plaintiff asserts that Defendant engaged in fraud and deception, intentionally misleading Plaintiff as to the severity of the damage to the vessel. This common-law fraud perpetuated upon the Plaintiff is separate and distinct from the statutory violations set forth under the CSPA. However, Plaintiff's fraud claim shares a common core of facts and related legal theories with Plaintiff's CSPA claim.

{¶146} Further, the fraud claim may be brought separately because R.C. 1345.13 specifically provides that "[t]he remedies in sections 1345.01 to 1345.13 * * * are *in addition to the remedies otherwise available for the same conduct under state or local law.*" (Emphasis added). In *Mid-America Acceptance Co. v. Lightle*,¹⁵⁷ the Tenth Appellate Court emphasized, "Nowhere in the Consumer Protection Act is it either expressly stated or implied that the Act is intended to supersede or abrogate any common-law remedies already available to the consumer."

¹⁵⁶ *Meade v. Nelson Auto Group*, 3rd Dist. No. 14-96-45, 1997 Ohio App. LEXIS 1589.

¹⁵⁷ *Mid-America Acceptance Co. v. Lightle* (1989), 63 Ohio App.3d 590, 579 N.E.2d 721

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{¶147} Asserting that the CSPA “did not supercede [sic] consumer’s remedies under common law fraud,” the Tenth Appellate Court in *Crawford v. Bill Swad Chevrolet, Inc.*,¹⁵⁸ stated “if treble damages had been awarded, such would not preclude a punitive damages award as well.” Thus, Plaintiff may seek an award of treble damages under the CSPA and punitive damages for fraud.

{¶148} A claim of common-law fraud requires proof of the following elements: (a) a representation or, where there is a duty to disclose, concealment of a fact, (b) which is material to the transaction at hand, (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (d) with the intent of misleading another into relying upon it, (e) justifiable reliance upon the representation or concealment, and (f) a resulting injury proximately caused by the reliance.¹⁵⁹

{¶149} In *Burr v. Stark Cty. Bd. of Commrs.*,¹⁶⁰ the Ohio Supreme Court held, “It has long been the rule in our state that “[a] person injured by fraud is entitled to such damages as will fairly compensate him for the wrong suffered; that is, the damages sustained by reason of the fraud or deceit, and which have naturally and proximately resulted therefrom.”¹⁶¹ The Court reaffirmed its reasoning that “the means of accomplishing the deception be complex or simple -- a deep-laid scheme of swindling or a direct falsehood -- a combined effort of a number of

¹⁵⁸ *Crawford v. Bill Swad Chevrolet, Inc.*, 10th Dist. No. 00AP-188, 2000 Ohio App. LEXIS 4221.

¹⁵⁹ *Burr v. Stark Cty. Bd. of Commrs.* (1986), 23 Ohio St. 3d 69, 491 N.E.2d 1101, paragraph two of the syllabus, following *Cohen v. Lamko, Inc.* (1984), 10 Ohio St. 3d 167, 462 N.E.2d 407; *Pumphrey v. Quillen* (1956), 165 Ohio St. 343, 135 N.E.2d 328; *Friedland v. Lipman* (1980), 68 Ohio App. 2d 255, 429 N.E.2d 456.

¹⁶⁰ *Burr v. Stark Cty. Bd. of Commrs.* (1986), 23 Ohio St. 3d 69, 491 N.E.2d 1101, citing *Foust v. Valleybrook Realty Co.* (1981), 4 Ohio App. 3d 164, 166. See 25 Ohio Jurisprudence 2d 32, Fraud and Deceit, Section 201. See also *Molnar v. Beriswell* (1930), 122 Ohio St. 348, paragraph one of the syllabus; *Bartges v. O’Neil* (1861), 13 Ohio St. 72, 77-78; *Bartholomew v. Bentley* (1846), 15 Ohio 659.

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associates or the sole effort of a solitary individual -- provided the deception be effected and the damage complained of be the consequence of the deception.”¹⁶²

{¶150} In *Russ v. TRW, Inc.*,¹⁶³ the Ohio Supreme Court held that “[a] representation which will serve as the basis for an action in common-law fraud is not confined to spoken or written words but may encompass conduct that amounts to an assertion not in accordance with the truth.¹⁶⁴ And in *Spradlin v. Collier*,¹⁶⁵ the Fourth Appellate Court, relying on *Burr*, concurred, asserting “knowledge can be implied from the surrounding circumstances.”

{¶151} In *Pumphrey v. Quillen*,¹⁶⁶ the Ohio Supreme Court stated that “[i]n an action for fraudulent misrepresentation, it is not necessary for the plaintiff to allege or prove that the defendant made the representation knowing that it was false.” The Court also stated that “[i]n such an action it is not a defense for the defendant to assert that he made the representation without knowing whether it was true or false, if his statement was made under circumstances which implied knowledge on his part.”¹⁶⁷ Thus, knowledge of falsity exists either (1) when a person makes a statement knowing that it is false, or (2) when a person makes a statement that is false but makes the statement without knowledge of its truth or falsity.

¹⁶¹ *Foust v. Valleybrook Realty Co.* (1981), 4 Ohio App. 3d 164, at 166. See *Molnar v. Beriswell* (1930), 122 Ohio St. 348, paragraph one of the syllabus; *Bartges v. O'Neil* (1861), 13 Ohio St. 72, 77-78; *Bartholomew v. Bentley* (1846), 15 Ohio 659.

¹⁶² *Burr v. Stark Cty. Bd. of Commrs.* (1986), 23 Ohio St. 3d 69, 491 N.E.2d 1101, citing *Bartholomew v. Bentley* (1846), 15 Ohio 659.

¹⁶³ *Russ v. TRW, Inc.* (1991), 59 Ohio St.3d 41, 570 N.E.2d 1076, 1991 Ohio LEXIS 956.

¹⁶⁴ See 3 Restatement of the Law 2d, Torts (1965), Section 525, Comment b; Prosser & Keeton, Law of Torts (5 Ed. 1984) 736-737, Section 106.

¹⁶⁵ *Spradlin v. Collier*, 4th Dist. No. 97CA2521, 1998 Ohio App. LEXIS 1428.

¹⁶⁶ *Pumphrey v. Quillen* (1956), 165 Ohio St. 343, 135 N.E.2d 328.

¹⁶⁷ *Pumphrey v. Quillen* (1956), 165 Ohio St. 343, 135 N.E.2d 328.

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{¶152} If Defendant made a representation not knowing whether it is true or false, he cannot be considered as innocent, since a positive assertion of a fact is, by plain implication, an assertion of knowledge concerning a fact. Further, “If one asserts that a thing is true within his personal knowledge, or makes a statement as of his own knowledge, or makes such an absolute, unqualified, and positive statement as implies knowledge on his part, when in fact he has no knowledge as to whether his assertion is true or false and his statement proves to be false, he is as culpable as if he had willfully [sic] asserted that to be true which he absolutely knew to be false and is equally guilty of fraud.”¹⁶⁸

{¶153} Here, the record reflects that Mr. Walker was not certain that his assertion that the vessel “hit a can” was true or false; however Mr. Oreskovich knew that his representations were false in that they understated the degree of damage and made them with intent to deceive. Further, the Disclosure Acknowledgement, which was prepared by Defendant MarineMax of Ohio, Inc., was made with intent to deceive, as evidenced by the omission of critical information, and that the information was identical to the representations of Mr. Walker and Mr. Oreskovich, reflecting a continuing intent to deceive.

{¶154} As well, the facts of this case show that Defendant, including Mr. Walker and Mr. Oreskovich should have known whether the representations they were making were true or false, and further show that they were not made as an expression of opinion but as positive statements of fact, with the intention that they should operate as an inducement to the sale of the vessel. The record also reflects that the representations were so made as to imply that Defendant,

¹⁶⁸ 23 American Jurisprudence, 921, Section 128.

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including Mr. Walker and Mr. Oreskovich knew them to be true and intended their statements should so be understood, believed and relied upon and operate as an inducement to the purchase of the premises.

{¶155} Moreover, Defendant’s previous attempt to sell the damaged vessel highlighted the fact that potential purchasers would be deterred by the visible evidence of damage to the vessel while out of the water, the admission that the vessel had been grounded hard on a reef, and that it had been sent back to Sea Ray for repairs. As a prospective buyer, Mr. Schmidt declined to purchase the vessel after observing the visible damage on the hull and because of the lack of documentation, including the absence of a marine survey and photos showing the damage and the subsequent repairs to the vessel. Yet, following the repairs by Atlantic Boat Repair, Inc., Defendant placed the vessel in the water, and withheld from Plaintiff, the fact that it had been grounded hard on the reef. As such, Defendant’s conduct reflects that it intentionally made false representations concerning the type and extent of the damage to the vessel for the purpose of selling it to an unsuspecting buyer.

{¶156} In *Foust v. Valleybrook Realty Co.*,¹⁶⁹ the Sixth Appellate Court emphasized, “[t]he fundamental rule is that the owner must be compensated for the loss sustained.”¹⁷⁰ And in *Crawford v. Bill Swad Chevrolet, Inc.*,¹⁷¹ the Tenth Appellate Court reaffirmed its prior decision in *Mid-America Acceptance Co.*, holding that “the trial court did not err in awarding * * * treble damages under R.C. 1345.09(B) and punitive damages for common law violations.” Further, in

¹⁶⁹ *Foust v. Valleybrook Realty Co.* (1981), 4 Ohio App. 3d 164, at 166.

¹⁷⁰ See *Groves v. Gray* (1942), 74 Ohio App. 384; 16 Ohio Jurisprudence 2d 91, Damages, Section 73.

¹⁷¹ *Crawford v. Bill Swad Chevrolet, Inc.*, 10th Dist. No. 00AP-188, 2000 Ohio App. LEXIS 4221.

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Galmish v. Cicchini,¹⁷² the Ohio Supreme Court held that “If punitive damages are proper, the aggrieved party may also recover reasonable attorney fees.”¹⁷³ In other words, “attorney fees may be awarded as an element of compensatory damages where the jury finds that punitive damages are warranted.”¹⁷⁴ Thus, if punitive damages are proper, Plaintiff may also recover reasonable attorney fees.¹⁷⁵

C. Plaintiff is Entitled to Punitive Damages Under the Fraud Claim

{¶157} In *Columbus Finance, Inc. v. Howard*,¹⁷⁶ the Ohio Supreme Court stated, “It is an established principle of law in this state that punitive damages may be awarded in tort cases involving fraud, insult or malice.”¹⁷⁷ Although Plaintiff stated that “he would be satisfied with the damages flowing from a CSPA violation if trebled,” this Court finds punitive damages to be altogether appropriate pursuant to the United States Supreme Court decisions in *BMW of North America, Inc. v. Gore*,¹⁷⁸ and *State Farm v. Campbell*.¹⁷⁹ As a practical matter, Plaintiff’s willingness to forgo punitive damages is not reflective of the strength or weakness of his case, but rather, constitutes an economic strategy that he believes will make him whole while reducing the risks of extended litigation or even a reduction of an award of punitive damages on appeal. However, this Court believes that application of the law requires an award of punitive damages.

¹⁷² *Galmish v. Cicchini* (2000), 90 Ohio St.3d 22, 2000 Ohio 7, 734 N.E.2d 782, 2000 Ohio LEXIS 2286.

¹⁷³ *Columbus Finance, Inc. v. Howard* (1975), 42 Ohio St. 2d 178, 183, 327 N.E.2d 654, 658.

¹⁷⁴ *Zoppo v. Homestead Ins. Co.* (1994), 71 Ohio St. 3d 552, 558, 644 N.E.2d 397, 402.

¹⁷⁵ *Roberts v. Mason* (1859), 10 Ohio St. 277; *Peckham Iron Co. v. Harper* (1884), 41 Ohio St. 100; *Davis v. Tunison* (1959), 168 Ohio St. 471, 155 N. E. 2d 904.

¹⁷⁶ *Columbus Finance, Inc. v. Howard* (1975), 42 Ohio St. 2d 178, 183, 327 N.E.2d 654, 658.

¹⁷⁷ *Roberts v. Mason* (1859), 10 Ohio St. 277; *Saberton v. Greenwald* (1946), 146 Ohio St. 414, 66 N. E. 2d 224.

¹⁷⁸ *BMW of North America, Inc. v. Gore* (1996), 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809, 1996 U.S. LEXIS 3390.

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{¶158} In *BMW of North America, Inc. v. Gore*,¹⁸⁰ the United States Supreme Court established three due process “guideposts” for courts to utilize when reviewing punitive damages: (1) the degree of reprehensibility of the defendant’s misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages authorized by the jury or the court and the civil penalties authorized or imposed in comparable cases. The Supreme Court reiterated the importance of these three guideposts in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*,¹⁸¹ stressing that an award of punitive damages is based upon an “application of law, rather than a decisionmaker’s caprice.”¹⁸²

{¶159} In *Gore*, the Supreme Court held that “it should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant’s culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.”¹⁸³

{¶160} Applying the first *Gore* guidepost, this Court finds that the harm caused in the case *sub judice* was economic as opposed to physical; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; and the harm was the

¹⁷⁹ *State Farm v. Campbell* (2003), 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585, 2003 U.S. LEXIS 2713.

¹⁸⁰ *BMW of North America, Inc. v. Gore* (1996), 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809, 1996 U.S. LEXIS 3390.

¹⁸¹ *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001), 532 U.S. 424, 121 S. Ct. 1678, 149 L. Ed. 2d 674, 2001 U.S. LEXIS 3520.

¹⁸² *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001), 532 U.S. 424, 121 S. Ct. 1678, 149 L. Ed. 2d 674, 2001 U.S. LEXIS 3520, citing *BMW of North America, Inc. v. Gore* (1996), 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809, 1996 U.S. LEXIS 3390.

¹⁸³ *BMW of North America, Inc. v. Gore* (1996), 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809, 1996 U.S. LEXIS 3390.

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result of actual malice, trickery, or deceit. Here, Defendant's deceit persuaded Plaintiff to purchase a vessel for \$780,151.83, the value of which was substantially reduced by the damages to the vessel's stringer system, and was in the opinion of one marine surveyor, "not to be seaworthy."¹⁸⁴ Defendant's deception and misrepresentations of the type and extent of the damage to the vessel constituted a reckless disregard of the health and safety of Plaintiff, his family, and other passengers on the vessel in jeopardy of a cataclysmic incident in the treacherous waters of Lake Erie.

{¶161} Further, Defendant's actions in minimizing the structural damage to the vessel, which included placing it in the water to hide the visible damage observed by a previous, potential buyer, and Defendant's misrepresentations of the type of damage incurred was the result of actual malice, trickery and deceit, and was not mere accident. This Court found that Mr. Walker and Mr. Oreskovich intentionally mislead or deceived Plaintiff about how the vessel was damaged, and the type of damage it sustained. As well, Defendant MarineMax of Ohio, Inc. intentionally withheld information about the cost of the damages to the vessel and the fact that the structural integrity of the vessel was compromised. Failing to disclose the information necessary to enable Plaintiff to make an informed purchase cannot be attributed to the lack of knowledge on the part of the salesman, or the questionable judgment of the service manager, but rather, reflects a pervasive mentality by the Defendant distributor and its employees to sell boats by any means possible.

{¶162} Moreover, the conduct of Defendant MarineMax of Ohio, Inc., its employees Mr. Walker and Mr. Oreskovich constituted a pattern of conduct that was designed to sell a vessel to

¹⁸⁴ Plaintiff's Exhibit 28, at 6.

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an unsuspecting buyer, regardless of its defects. The conduct of Defendant prioritized monetary gain over the personal safety of its buyers. Thus, pursuant to the first guidepost, this Court finds that an award of punitive damages to Plaintiff based on Defendant's conduct towards Plaintiff is proper punishment for this reprehensible conduct.

{¶163} Turning to the second *Gore* guidepost, the Supreme Court in *State Farm v. Campbell*,¹⁸⁵ “again declined to impose a bright-line ratio which a punitive damages award cannot exceed.” The Court noted, however, in *Pacific Mut. Life Ins. Co. v. Haslip*,¹⁸⁶ it had “concluded that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety.” The Court again cited that 4 to 1 ratio in *Gore* and *Campbell*. But in *Campbell*, the Court noted that “[w]hile these ratios are not binding, they are instructive. They demonstrate what should be obvious: single digit multipliers are more likely to comport with due process while still achieving the State's goals of deterrence and retribution, than awards in the range of 500 to 1,” or in *Campbell*, “of 145 to 1.”¹⁸⁷ Although the amount of economic damages in this case was significant, the Court in *Campbell* suggested that in cases where compensatory damages are substantial, “a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.” Observing that “[o]ur jurisprudence and the principles it has now established demonstrate * * * that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree will satisfy due process,” the Court acknowledged that “[t]he precise

¹⁸⁵ *State Farm v. Campbell* (2003), 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585, 2003 U.S. LEXIS 2713.

¹⁸⁶ *Pacific Mut. Life Ins. Co. v. Haslip* (1991), 499 U.S. 1, 111 S. Ct. 1032, 113 L. Ed. 2d 1, 1991 U.S. LEXIS 1306.

¹⁸⁷ *State Farm v. Campbell* (2003), 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585, 2003 U.S. LEXIS 2713.

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award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to plaintiff."¹⁸⁸

{¶164} Here, this was an economic transaction; there were no physical injuries; but Defendant refused rescission, forcing Plaintiff to incur additional economic damages. More importantly, "the most important indicium of the reasonableness of a punitive damages award,"¹⁸⁹ is the degree of reprehensibility of Defendant's conduct, which caused significant economic harm to the Plaintiff, evinced an indifference to, and reckless disregard to the health and safety of the Plaintiff, his family and others aboard the vessel, and most significantly, was the result of intentional malice, trickery and deceit, rather than mere accident.

{¶165} The compensatory damages awarded to Plaintiff under the CSPA, however, also contain a punitive element, treble damages. However, as Ohio Courts have noted, "[i]t is clear that the legislature fully intended for the remedies available to the consumer in R.C. 1345.09 [CSPA] to be in addition to remedies already available such as damages for common-law fraud."¹⁹⁰ In *Mid-America Acceptance Co.*, the Tenth Appellate Court emphasized that "the Consumer Protection Act does not supersede or abrogate any common-law remedy the consumer may have in addition to the statutory remedies available," finding that in the appropriate cases, "treble damages under the statute and punitive damages may both be proper." The Court in *Campbell* acknowledged that while "States enjoy considerable discretion in deducing when punitive damages are warranted, each award must comport with the principles set

¹⁸⁸ *State Farm v. Campbell* (2003), 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585, 2003 U.S. LEXIS 2713.

¹⁸⁹ *State Farm v. Campbell* (2003), 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585, 2003 U.S. LEXIS 2713, quoting *BMW of North America, Inc. v. Gore* (1996), 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809, 1996 U.S. LEXIS 3390.

¹⁹⁰ *Mid-America Acceptance Co. v. Lightle* (1989), 63 Ohio App.3d 590, 579 N.E.2d 721.

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forth in *Gore*. In Ohio, the Supreme Court held in *Combs Trucking, Inc. v. Internatl. Harvester Co.*,¹⁹¹ that “[i]n each case of alleged fraud the plaintiff, in order to be awarded punitive damages, must establish not only the elements of the tort itself but, in addition, must either show that the fraud is aggravated by the existence of malice or ill will, or must demonstrate that the wrongdoing is particularly gross or egregious.”¹⁹² And as the Ohio Supreme Court in *Logsdon v. Graham Ford Co.*,¹⁹³ asserted, “a bare case of fraud or constructive fraud does not warrant the assessment of exemplary damages.” Thus, gross or egregious fraud may support an award of punitive damages but simple fraud does not. In order to prove that punitive damages are appropriate, it must be shown that the fraud contained an element of malice or ill will.

{¶166} In *Klemas v. Flynn*,¹⁹⁴ the Ohio Supreme Court held that because “punitive damages are assessed for punishment and not compensation, a positive element of conscious wrongdoing is always required. This element has been termed conscious, deliberate or intentional. It requires the party to possess knowledge of the harm that might be caused by his behavior.” But as the Ohio Supreme Court in *Digital & Analog Design Corp. v. North Supply Co.*,¹⁹⁵ stated earlier, “malice may be inferred from conduct.”¹⁹⁶

{¶167} In the case *sub judice*, Plaintiff has demonstrated that the fraud was aggravated by malice or ill will on the part of the Defendant, and that the fraudulent inducement was

¹⁹¹ *Combs Trucking, Inc. v. Internatl. Harvester Co.* (1984), 12 Ohio St. 3d 241, 466 N.E.2d 883, 1984 Ohio LEXIS 1204.

¹⁹² Citing *Logsdon v. Graham Ford Co.* (1978), 54 Ohio St.2d 336, 376 N.E.2d 1333.

¹⁹³ *Logsdon v. Graham Ford Co.* (1978), 54 Ohio St.2d 336, 376 N.E.2d 1333.

¹⁹⁴ *Klemas v. Flynn* (1993), 66 Ohio St. 3d 249, 335, 611 N.E.2d 810, 1176, citing *Preston v. Murty* (1987), 32 Ohio St. 3d 334, 512 N.E.2d 1174.

¹⁹⁵ *Digital & Analog Design Corp. v. North Supply Co.* (1992), 63 Ohio St. 3d 657, 590 N.E.2d 737, 1992 Ohio LEXIS 935.

¹⁹⁶ See *Cattaneo v. Taylor*, 1997 Ohio App. LEXIS 5886

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“particularly gross or egregious.”¹⁹⁷ There is proof of conscious wrongdoing here. As well, there is evidence of malice or ill will on the part of Defendant warranting a punitive damage award.

{¶168} The third guidepost in *Gore* is the disparity between the punitive damages award and the “civil penalties authorized or imposed in comparable cases.”¹⁹⁸ Here, the CSPA provides for treble damages in the amount of \$1,459,213.41, based on actual damages of \$484,404.47. Thus, an award of \$484,404.47 for punitive damages, which is identical to the amount of actual damages and when combined with the CSPA’s treble damages, is four times the actual damages, will serve to fulfill the aim of tort law, which is to prevent individuals and firms from carrying out their activities in a manner or to a degree that detracts from societal well-being.

{¶169} An application of the *Gore* guideposts to the facts of this case, particularly in light of the substantial compensatory damages awarded, and the treble damages provided for by the CSPA, justify an award of punitive damages at or near the amount of compensatory damages. An award of \$484,591.27 for punitive damages therefore, is reasonable and proportionate to the wrong committed because it was the conscious, deliberate, intentional, malicious, deceitful, and particularly gross and egregious conduct of the Defendant that resulted in the harm to the Plaintiff.

¹⁹⁷ *Combs Trucking, Inc. v. Internatl. Harvester Co.* (1984), 12 Ohio St. 3d 241, 466 N.E.2d 883, 1984 Ohio LEXIS 1204.

¹⁹⁸ *State Farm v. Campbell* (2003), 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585, 2003 U.S. LEXIS 2713, citing *BMW of North America, Inc. v. Gore* (1996), 517 U.S. 559, 585, 116 S. Ct. 1589, 134 L. Ed. 2d 809, 1996 U.S. LEXIS 3390.

D. Plaintiff is Entitled to Attorney's Fees Under the CSPA and the Fraud Claim

{¶170} Plaintiff is also entitled to an award of attorney fees pursuant to R.C. 1345.09(F)(2), which provides that trial courts may award the prevailing plaintiff a “reasonable attorney’s fee” if “the supplier has knowingly committed an act or practice that violates the [CSPA].” In *Einhorn v. Ford Motor Co.*,¹⁹⁹ the Ohio Supreme Court defined “‘knowingly’ committing an act or practice in violation of R.C. Chapter 1345 to mean that the supplier need only intentionally do the act that violates the [CSPA]. The supplier does not have to know that his conduct violates the law for the court to grant attorney fees.” In *Brooks v. Hurst Buick-Pontiac-Olds-GMC*,²⁰⁰ the Twelfth Appellate Court relied upon R.C. 1345.01(E), which defined “knowledge” as “* * * actual awareness, but such actual awareness may be inferred where objective manifestations indicate that the individual involved acted with such awareness.” Concurring, the Ohio Supreme Court acknowledged that the language “* * * knowingly committed an act or practice that violates this chapter” is required for liability to attach, and that “a supplier must have committed a deceptive or unconscionable act or practice.”²⁰¹ Finally, the Ohio Supreme Court emphasized that “[t]his conduct must violate the Consumer Sales Practices Act. The statutory language does not state that the supplier must act with the knowledge that his acts violate the law.”²⁰² Indeed, as the Twelfth Appellate Court in *Brooks v. Hurst Buick-Pontiac-Olds-GMC*,²⁰³ stated, “*Ignorantia legis neminem excusat.*”

¹⁹⁹ *Einhorn v. Ford Motor Co.* (1990), 48 Ohio St.3d 27, 19, 548 N.E.2d 933, 1990 Ohio LEXIS 19.

²⁰⁰ *Brooks v. Hurst Buick-Pontiac-Olds-GMC* (1985), 23 Ohio App. 3d 85, 23 OBR 150, 491 N.E.2d 345.

²⁰¹ *Einhorn v. Ford Motor Co.* (1990), 48 Ohio St.3d 27, 19, 548 N.E.2d 933, 1990 Ohio LEXIS 19.

²⁰² *Einhorn v. Ford Motor Co.* (1990), 48 Ohio St.3d 27, 19, 548 N.E.2d 933, 1990 Ohio LEXIS 19.

²⁰³ *Brooks v. Hurst Buick-Pontiac-Olds-GMC* (1985), 23 Ohio App. 3d 85, 23 OBR 150, 491 N.E.2d 345.

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{¶171} Having determined that “One can knowingly do an act without knowing that the act is in violation of the law,”²⁰⁴ this Court finds that Defendants knowingly committed an act or practice that violates this chapter when it failed to disclose the structural damage to the vessel, including the extent of this damage. As well, Defendant’s knowingly committed an act or practice that violates this chapter when it refused to accept Plaintiff’s revocation of the vessel. Thus, pursuant to R.C. 1345.09(F)(2), this Court may award Plaintiff reasonable attorney fees, including expenses, because the Defendant committed an act or practice with was deceptive, unfair or unconscionable.²⁰⁵

{¶172} In *Bittner v. Tri-County Toyota, Inc.*,²⁰⁶ the Ohio Supreme Court addressed the proper standard for assessing an award of attorney’s fees to a prevailing plaintiff in a case involving violations of the CSPA. In holding that “[t]he most useful starting point for determining the amount of a fee award is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate,”²⁰⁷ the United States Supreme Court emphasized that “[t]his calculation provides an objective basis on which to make an initial estimate of the value of a lawyer’s services.”²⁰⁸ But the Court in *Bittner* also noted that R.C. 1345.09(F)(2) limits the fee award to work “reasonably performed.”²⁰⁹

²⁰⁴ *Brooks v. Hurst Buick-Pontiac-Olds-GMC* (1985), 23 Ohio App. 3d 85, 23 OBR 150, 491 N.E.2d 345.

²⁰⁵ See Roberts and Martz, “Consumerism Comes of Age: Treble Damages and Attorneys Fees in Consumer Transactions - The Ohio Consumer Sales Practices Act,” 42 Ohio St. L.J. 927, at 957 (1981).

²⁰⁶ *Bittner v. Tri-County Toyota, Inc.* (1991), 58 Ohio St. 3d 143, 569 N.E.2d 464

²⁰⁷ *Hensley v. Eckerhart* (1983), 461 U.S. 424, 433, 103 S. Ct. 1933, 76 L. Ed. 2d 40, See *Bittner v. Tri-County Toyota, Inc.* (1991), 58 Ohio St. 3d 143, 145, 569 N.E.2d 464.

²⁰⁸ *Hensley v. Eckerhart* (1983), 461 U.S. 424, 433, 103 S. Ct. 1933, 76 L. Ed. 2d 40.

²⁰⁹ *Bittner v. Tri-County Toyota, Inc.* (1991), 58 Ohio St. 3d 143, 145, 569 N.E.2d 464.

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{¶173} Further, having found that Plaintiff is entitled to punitive damages under the fraud claim, Plaintiff is also entitled to attorney’s fees. In *Columbus Finance, Inc. v. Howard*,²¹⁰ the Ohio Supreme Court stated “If punitive damages are proper, the aggrieved party may also recover reasonable attorney fees.” In other words, “attorney fees may be awarded as an element of compensatory damages where * * * punitive damages are warranted.”²¹¹

{¶174} In *Cremeans v. Robbins*,²¹² the Fourth Appellate Court held that “[a]fter calculating this starting figure, or ‘lodestar,’ the court may then modify the amount upward or downward by application of the various factors listed in DR 2-106(B),” which include: “the time and labor involved in maintaining the litigation; the novelty and difficulty of the questions involved; the professional skill required to perform the necessary legal services; the attorney’s inability to accept other cases; the fee customarily charged; the amount involved and the results obtained; any necessary time limitations; the nature and length of the attorney/client relationship; the experience, reputation, and ability of the attorney; and whether the fee is fixed or contingent.”²¹³

{¶175} The Court in *Cremeans* also noted that where a prevailing plaintiff’s claims “can be separated into a claim for which fees are recoverable and a claim for which no fees are recoverable, the trial court must award fees only for the amount of time spent pursuing the claim for which fees may be awarded.”²¹⁴ Here, Plaintiff has prevailed on all claims, including its

²¹⁰ *Columbus Finance, Inc. v. Howard* (1975), 42 Ohio St. 2d 178, 183, 327 N.E.2d 654, 658.

²¹¹ *Zoppo v. Homestead Ins. Co.* (1994), 71 Ohio St. 3d 552, 558, 644 N.E.2d 397, 402.

²¹² *Cremeans v. Robbins*, 4th Dist. No. 99 CA 2520, 2000 Ohio App. LEXIS 2753.

²¹³ *Bittner v. Tri-County Toyota, Inc.* (1991), 58 Ohio St. 3d 143, 145, 569 N.E.2d 464

²¹⁴ *Bittner v. Tri-County Toyota, Inc.* (1991), 58 Ohio St. 3d 143, 569 N.E.2d 464

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claim for fraud. In *Budner v. Lake Erie Homes*,²¹⁵ the Eleventh Appellate Court held that “[a]ppellees’ claims are not distinct or separable; they arise from a common core of facts. Because appellees’ ‘claims presented a common core of facts and related legal theories, we conclude that it was permissible for the trial court to treat the total number of hours expended on all claims as reasonably expended hours.’”²¹⁶ Similarly, this Court finds that Plaintiff’s CSPA and fraud claims not to be distinct or separable, and that they arise from a common core of facts. Moreover, both claims presented a common core of facts and related legal theories. As such, this Court will consider the total number of hours on all claims if Plaintiff demonstrates that they are reasonably expended hours.²¹⁷

{¶176} Further, in considering the reasonableness of the fees expended by the Plaintiff, this Court will rely on its observation of the quality and quantity of the services rendered before it. As the Court in *Cremeans*, emphasized, “[t]he trial court was in the best position to determine the value of the services rendered before it.” In this case, counsel for both Plaintiff and Defendant provided *exemplary* legal services in content and professional demeanor on behalf of their clients. As such, this Court will consider an award that satisfies the standards set forth by the Ohio Courts in fashioning an award that properly reflects the work “reasonably performed” and is not so high or low “as to shock the conscience” of a reviewing court.²¹⁸

{¶177} Thus, this Court will schedule a hearing on the matter of Attorney’s fees at which time it will take evidence as to the work “reasonably performed” by Plaintiff’s attorneys.

²¹⁵ *Budner v. Lake Erie Homes*, 11th Dist. No. 2000-P-0108, 2001 Ohio 4288, 2001 Ohio App. LEXIS 4446.

²¹⁶ See *Parker v. I & F Insulation Co., Inc.*, 1st Dist. No. C-960602, 1998 Ohio App. LEXIS 1187.

²¹⁷ Since there are no unsuccessful claims, this Court need not separate those unsuccessful claims from the successful claims. *Parker v. I & F Insulation Co., Inc.*, 1st Dist. No. C-960602, 1998 Ohio App. LEXIS 1187, citing *Hensley v. Eckerhart* (1983), 461 U.S. 424, 434-435, 103 S. Ct. 1933, 1940, 76 L. Ed. 2d 40.

V. CONCLUSION

{¶178} This Court finds that Plaintiff has established that Defendant, MarineMax of Ohio, Inc., violated the Ohio Consumer Sales Practices Act, R.C. 1345.01, et seq., which prohibits deceptive acts and practices in connection with a consumer transaction. As well, this Court finds that Plaintiff has established that Defendant has engaged in fraud and deception, and that the wrongdoing was particularly gross or egregious, containing an element of malice or ill will. Accordingly,

{¶179} IT IS ORDERED, ADJUDGED, and DECREED that the actual damages suffered by Plaintiff total \$484,591.27;

{¶180} IT IS FURTHER ORDERED, ADJUDGED, and DECREED that Plaintiff is awarded \$1,453,773.80 as treble damages permitted under the CSPA;

{¶181} IT IS FURTHER ORDERED, ADJUDGED, and DECREED that Plaintiff is awarded \$484,591.27 as punitive damages under the fraud claim;

{¶182} IT IS FURTHER ORDERED, ADJUDGED, and DECREED that Plaintiff is awarded a total of \$1,938,365.00, exclusive of attorney's fees for treble damages and punitive damages under the CSPA and fraud claims;

{¶183} IT IS FURTHER ORDERED, ADJUDGED, and DECREED that Plaintiff is entitled to attorney's fees, and the amount will be set by this Court following a hearing scheduled for October 10, 2005, at 1:00pm;

{¶184} IT IS FURTHER ORDERED, ADJUDGED, and DECREED that costs of this proceeding is to be paid by Defendant.

²¹⁸ *Bittner v. Tri-County Toyota, Inc.* (1991), 58 Ohio St. 3d 143, 146, quoting *Brooks v. Hurst Buick-Pontiac-Olds-*

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{¶185} Clerk of Courts shall send copies of this Decision and Order to all parties of record or their counsel by regular U.S. Mail.

SEPTEMBER 12, 2005

PAUL C. MOON, JUDGE

COMMON PLEAS COURT OF OTTAWA COUNTY

CERTIFICATE OF SERVICE

A copy of the foregoing "Decision and Order" was delivered by regular Mail, this 12th day of September, 2005, to the following:

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SEPTEMBER 12, 2005

JOAN MONNETT, CLERK OF COURTS
/DEPUTY CLERK

Note: If there is a party and/or attorney not listed above, but is reflected on the Clerk's Docket as not excused, the Clerk's Office will add them to this page.