[Cite as *Englert v. Nutritional Sciences, L.L.C.*, 2008-Ohio-5062.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Donna Englert,	:	
Plaintiff-Appellant,	:	
v.	:	No. 07AP-989 (C.P.C. No. 05CV-7702)
Nutritional Sciences, LLC, et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

O P I N I O N

Rendered on September 30, 2008

Luper Neidenthal & Logan LPA, *David M. Scott*, and *Nicole VanderDoes*, for appellant.

James L. Dye, for appellees.

APPEAL from the Franklin County Court of Common Pleas.

McGRATH, P.J.

{¶1} Plaintiff-appellant, Donna Englert ("Englert"), appeals from the judgment of the Franklin County Court of Common Pleas granting summary judgment in favor of defendants-appellees, Rodney Zeune[1] and Nutritional Sciences, LLC ("Nutritional Sciences"). For the following reasons, we affirm.

{¶2} The following facts are relevant to our discussion. Nutritional Sciences was an Ohio corporation that produced nutritional type supplements. As a promotion,

Nutritional Sciences sponsored a contest called the "Quarter Million Dollar Challenge" ("the contest"), whereby a panel of judges would choose several winners (in various categories) based upon a contestant's body transformation subsequent to using Nutritional Sciences' products and training plans for 13 consecutive weeks. According to the contest's rules and regulations ("the contract"), "[a]ll winners must agree to the regulations outlined specifically for winners before claiming championship or money." (Complaint at Exhibit A.) An asterisk appears at the end of the foregoing, which corresponds to a provision that explicitly reserved to Nutritional Sciences "the right to cancel the [contest] at anytime, or to make changes as we see fit." Id. Said reservation of rights was conspicuous and plain; it was set off separately in an easy to read font, not buried within a myriad of contractual language. Another contest rule explained that Nutritional Sciences "reserve[d] the right to use [the contestant's] photo in any promotional medium[,]" and all photographs that are submitted would become the property of Nutritional Sciences. Id.

{¶3} Englert entered the contest on or about October 1, 2002. In an e-mail dated July 24, 2003, Englert was notified that she was the female runner up in her age group, and was advised that the "winning payout documentation [would] be mailed out to [her] within 14-21 days." Id. at Exhibit D. To claim her prize, Englert was advised that the paperwork would need to be signed and returned to Nutritional Sciences within 48 hours of her receipt. Englert received the paperwork, which was labeled, "the challenge winner agreement" ("agreement"). The agreement indicated that the prize Englert would receive was a cash award in the amount of $250, plus $250 worth of products from Nutritional

[1] Rodney Zeune was the CEO of Nutritional Sciences, which is now defunct.

Sciences. The prize as set forth in the agreement, however, was different than the amount originally advertised ($1,500 in cash and $500 worth of products).[2] Englert refused to sign the agreement and claim the reduced prize.

{¶4} In July 2005, Englert filed suit against Nutritional Sciences, alleging breach of contract, fraud, unauthorized use of likeness, invasion of privacy, and violation of the Ohio Consumer Sales Practices Act (CSPA). The parties filed cross-motions for summary judgment, which the trial court resolved in favor of Nutritional Sciences. Englert filed a timely appeal, advancing the following seven assignments of error for our review:

> I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN HOLDING THAT APPELLEES ARE NOT LIABLE TO MS. ENGLERT FOR BREACH OF CONTRACT.
>
> II. THE TRIAL COURT ERRED IN HOLDING THAT APPELLEES HAD THE RIGHT TO CHANGE THE TERMS OF THE UNILATERAL CONTRACT AFTER FULL PERFORMANCE BY MS. ENGLERT.
>
> III. THE TRIAL COURT ERRED IN HOLDING THAT MS. ENGLERT IS NOT ENTITLED TO DAMAGES FOR BREACH OF CONTRACT.
>
> IV. THE TRIAL COURT ERRED AS A MATTER OF LAW IN HOLDING THAT APPELLEES ARE NOT LIABLE TO MS. ENGLERT FOR UNAUTHORIZED USE OF LIKENESS AND INVASION OF PRIVACY.
>
> V. THE TRIAL COURT ERRED AS IN HOLDING THAT MS. ENGLERT IS NOT ENTITLED TO DAMAGES FOR UNAUTHORIZED USE OF LIKENESS AND INVASION OF PRIVACY.
>
> VI. THE TRIAL COURT ERRED AS A MATTER OF LAW IN HOLDING THAT APPELLEES ARE NOT LIABLE TO MS. ENGLERT FOR FRAUD.

[2] Nutritional Sciences' financial difficulties were the reason given for the reduced prize amount.

VII. THE TRIAL COURT ERRED AS A MATTER OF LAW IN HOLDING THAT APPELLEES ARE NOT LIABLE TO MS. ENGLERT FOR VIOLATION OF THE OHIO CONSUMER SALES PRACTICES ACT.

{¶5} This matter was decided in the trial court by summary judgment, which under Civ.R. 56(C) may be granted only when there remains no genuine issue of material fact, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to but one conclusion, that conclusion being adverse to the party opposing the motion. *Tokles & Son, Inc. v. Midwestern Indemn. Co.* (1992), 65 Ohio St.3d 621, 629, citing *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64. Additionally, a moving party cannot discharge its burden under Civ.R. 56 simply by making conclusory assertions that the nonmoving party has no evidence to prove its case. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. Rather, the moving party must point to some evidence that affirmatively demonstrates that the nonmoving party has no evidence to support his or her claims. Id.

{¶6} An appellate court's review of summary judgment is de novo. *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588; *Bard v. Society Nat. Bank, nka KeyBank* (Sept. 10, 1998), Franklin App. No. 97APE11-1497. Thus, we conduct an independent review of the record and stand in the shoes of the trial court. *Jones v. Shelly Co.* (1995), 106 Ohio App.3d 440, 445. As such, we must affirm the trial court's judgment if any of the grounds raised by the movant at the trial court are found to support it, even if the trial court failed to consider those grounds. See *Dresher*, supra; *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41-42.

{¶7} We shall address Englert's first, second, and third assignments of error, as they are interrelated. The gravamen of Englert's argument is that the trial court erred by finding the reservation of rights provision to be valid. Englert asserts that the contest was a unilateral contract, and, as such, Nutritional Sciences was precluded from changing the rules, i.e., the amount of the prize, after she had fully performed. While we are certainly sympathetic to Englert's position, we are constrained to follow the law, as it exists and has been interpreted, rather than our feeling of moral equity.

{¶8} Courts have generally held that the law of contracts governs the relationship between a contest promoter and a contestant. See, e.g., *James v. McDonald's Corp*. (C.A.7 2005), 417 F.3d 672; *Scott v. Sons of American Legion Agnew Shinaberger*, Williams App. No. WM-02-071, 2003-Ohio-3106; *Barnes v. State of Mich.* (Aug. 22, 1997), 1997 Mich.App. LEXIS 3218; *First Texas Savings Assoc. v. Jergins* (Tex.App.1986), 705 S.W.2d 390; *Estlow v. New Hampshire Sweepstakes Comm.* (N.H.1982), 122 N.H. 719; *Harlem-Irving Realty, Inc. v. Alesi* (Ct.App.Ill.1981), 99 Ill. App.3d 932; *Hertz v. Montgomery Journal Publishing Co*. (Ala.App. 1913), 9 Ala. App. 178; Annotation, Private Contests and Lotteries: Entrants Rights and Remedies (1988), 64 A.L.R.4th 1021, 1045-1052.

{¶9} "In order to establish the formation of an enforceable contract, an entrant must show (1) the offer of a prize by the sponsor for the performance of a specified act, (2) competition in the contest, and (3) the performance of the specified act required for winning the contest." *Bellows v. Delaware McDonald's Corp*. (Mich.Ct.App.1994), 206 Mich.App. 555, 558, citing *Natl. Amateur Bowlers, Inc. v. Tassos* (D.Kansas 1989), 715

F.Supp. 323, 325; *Las Vegas Hacienda, Inc. v. Gibson* (Nev.1961), 77 Nev. 25, 27. We find that an application of the foregoing to the facts of this case clearly demonstrates the existence of a contract. To that end, the cases cited by the dissent in paragraph XXX support that conclusion, as each court therein construed the contest at issue as a unilateral contract. Unlike this case, however, none of those cases appear to have involved a reservation of rights, the exercise of which is the central issue before us.

{¶10} As germane to our discussion, while a contestant's compliance with the rules of a contest[3] is necessary to form a binding contract, "[t]he promoter's obligation is limited by the terms of the offer, including the conditions and rules of the contest that are made public." *James*, supra, at 677, citing *Workmon v. Publishers Clearing House* (C.A.6 1997), 118 F.3d 457, 459; see, also, *Barnes v. McDonald's Corp*. (E.D.Ark. 1999), 72 F.Supp.2d 1038, 1042-43, aff'd, (C.A.8 2000), 230 F.3d 1362 (unpublished); *Tassos, supra*; *Johnson v. BP Oil Co.* (Ala.1992), 602 So.2d 885, 888; *Harlem-Irving Realty Inc*., supra, at 932; 1 E. Allan Farnsworth, Farnsworth on Contracts § 3.10, at 260-62 & n.34 (3d ed. 2004); 1 Richard A. Lord, Williston on Contracts § 4.3, at 360 (1990); Michael P. Sullivan, Annotation, Private Contests and Lotteries: Entrants' Rights and Remedies, 64

[3] Although Ohio cases involving contests are scant, this principle has been applied in Ohio in cases involving tournaments sponsored by voluntary associations. For example, in *Kresse v. North Coast Charter Boat Assoc*., Lake App. No. 2006-L-055, 2006-Ohio-6871, is demonstrative of the above principle. *Kresse* involved a dispute over which team won a fishing tournament. One of the rules provided that winners must be willing to submit to a polygraph test, and another provided that protests would be settled by the tournament committee or by the results of the polygraph test. When the winning team was declared, and a protest ensued, one of the members of the winning team was selected to take a polygraph, which he failed. He then took and passed another polygraph test, which was done at his own expense. The member argued on appeal that his second polygraph test should have been considered. The court rejected that argument based on the fact that there was no provision in the rules that allowed for a follow up polygraph test. Id. at ¶23-24. See, also, *Lough v. Varsity Bowl, Inc.* (1963), 16 Ohio St.2d 153, 154; *Hoinke Classic, Inc. v. Pape* (Sept. 19, 1997), Hamilton App. No. C-961011; *Stibora v. Greater Cleveland Bowling Assoc*. (1989), 63 Ohio App.3d 107.

A.L.R. 4th 1021 (1988). See, also, *Bellows*, supra, at 558-559; *Tackett v. McDonald's Corp.* (Ark.Ct.App.1999), 68 Ark.App. 41; *Board v. Ohio Lottery Comm.* (Dec. 14, 1999), Franklin App. No. 99AP-208 ("The sale and redemption of lottery tickets are governed by general principles of contract law. Lottery tickets such as those purchased by appellant contain express terms requiring compliance with the rules and regulations of the commission, and lottery players are deemed to agree to abide by the terms of the game."), citing *Peters v. Ohio State Lottery Comm.* (1992), 63 Ohio St.3d 296, 298-299; *Woodbridge Partners Group, Inc. v. Ohio Lottery Comm.* (1994), 99 Ohio App.3d 269; *Estlow*, supra.

{¶11} A review of both federal and state case law discloses that giving force and effect to limitations contained in rules and regulations has been universally applied. For example, in *McBride v. New York City Off-Track Betting* (N.Y.App.1978), 410 N.Y.S.2d 868, four plaintiffs purchased that day's Pick-Four tickets. After purchasing the tickets, the defendant cancelled all betting on the Pick-Four. The plaintiffs, however, had correctly named the winners, and filed suit against OTB when it refused to honor their tickets. Despite the fact the plaintiffs had fully performed (i.e., by correctly picking the winners and purchasing tickets), the court held that the plaintiffs could not recover because, amongst OTB's regulations, was a reservation of rights that permitted them to cancel betting for any reason.

{¶12} In *James*, supra, McDonald's was promoting its sales by sponsoring a game called "Who Wants to be a Millionaire." The plaintiff purchased what she believed to be a winning ticket worth $1,000,000 from a participating franchise. In order to redeem

her prize, the plaintiff sent the card in to McDonald's redemption center, which informed her that her card was only worth "food prizes and $1 to $5 in cash." Id. at 674. The plaintiff filed suit against McDonald's, which filed a motion to compel arbitration. The seventh circuit court of appeals held that the plaintiff was required to submit to arbitration. It explained that the rules for the game included an arbitration clause, and, by purchasing the ticket, the plaintiff agreed to be bound by the conditions and the rules set forth by McDonald's. See, also, *Bellows*, supra (McDonald's was not required to pay plaintiff, who held the winning ticket to a $10,000,000 prize, because the rules of the contest provided that immediate family members were not eligible to participate, and the plaintiff's married daughter, who lived thirty miles away, worked for McDonald's); *Tackett*, supra (McDonald's was not required to pay plaintiff the prize amount because the ticket contained an error and the contest's rules clearly stated that pieces that contained errors were void, notwithstanding the fact that the plaintiff did not create the error and did not know it contained the same when purchased). These cases, while not concerning a reservation of rights included in a contest's rules and regulations by its promoter, do demonstrate, however, that courts will enforce limitation provisions that are expressed therein. In other words, the rules and regulations of the contest set forth the promoter's obligations to a contestant, and such is unaffected by the latter's performance.

{¶13} It then serves to reason that case law similarly indicates that a sponsor or promoter may not change or modify the terms of a contest unless the rules and regulations permitted the same, or, the contestant assented to the modification. For example, in *Bays v. U. S. Camera Publishing Corp*. (Mich.Ct.App. 1969), 18 Mich.App.

385, 388, the court held that the defendant could not impose a restriction on the assignment and transfer of the prize won by the plaintiff (a swimming pool) because said restriction was not included in the original terms of the contest, and, therefore, constituted a new provision. See, also, *Hertz*, supra (defendant repudiated the contract when it offered the plaintiff a different prize than that advertised in its original offer, and the express terms of the contract did not provide that the defendant could do so).

{¶14} The contractual principles and case law discussed above do not support the finding that Nutritional Sciences breached its contract with Englert. The starting point for our analysis is the contest rule that provided, "[a]ll winners must agree to the regulations outlined specifically for winners before claiming championship or money." (Complaint at Exhibit A.) The provision that corresponds to this rule is Nutritional Sciences' reservation of rights, in which it explicitly reserved "the right to cancel the [contest] at anytime, or to make changes as we see fit." Id. In reading the contract as a whole and giving effect to each provision, as we are required to do, *Saunders v. Mortensen*, 101 Ohio St.3d 86, 89, 2004-Ohio-24, at ¶16, we find the language of the reservation of rights to be unambiguous, and, therefore, the contract is interpreted as it stands. *Shifrin v. Forest City Ents., Inc.* (1992) 64 Ohio St.3d 635, 638.[4] And, as it stands, all contest winners must agree to abide by the rules and regulations of the contest, one of which is the reservation of rights. Succinctly stated, as a condition to claiming their prize, contest winners (such as Englert) agreed to be bound by the reservation of rights, thereby agreeing that Nutritional Sciences could cancel the contest or make changes.

[4] It should be noted that Englert does not assert that the reservation of rights provision is ambiguous.

{¶15} Nutritional Sciences' rights, however, were not unfettered. Reading the rule and regulation together to garner its meaning as a whole, it is clear that, while Nutritional Sciences could cancel the contest at any time, or make any changes it deemed necessary, it could only do so "before" a winner claimed her prize. (Complaint at Exhibit A.) In other words, Nutritional Sciences could exercise its reservation of rights at any time *before* a winner claims her prize. And, here, that is precisely what occurred. Thus, when Nutritional Sciences offered Englert a prize amount lesser than that which was originally advertised, it was exercising the right it had reserved, i.e., to change the terms of the contest, and the mere act of doing so does not constitute a breach. To find that Nutritional Sciences breached the contract by exercising its right would be to accord it the same treatment as the defendants in *Hertz* or *Bays*, who did not reserve any such rights – an anomalous result given the difference between the contract before us and the ones at issue in those cases.

{¶16} In the context of a case such as this, where the contestant has no vested right but only the chance to win, the phrase "at any time" reasonably includes after Englert's performance had been completed. This is especially true since the contract before us requires that a *winner* agree to be bound by all the rules and regulations *before* claiming her prize – and to be a winner, the contestant must have fully and successfully completed performance. The phrase "at any time," as used in this context and when considered in light of the contractual language, also vitiates against finding that the contract between the parties was of an illusory nature. See, e.g., *Imbrogno v. MIMRx.COM, Inc.*, Franklin App. No. 03AP-345, 2003-Ohio-6108, at ¶8 (a promise is

illusory when, by its terms, the promissor retains unfettered discretion to determine the nature or extent of his own performance; this unlimited right, in effect, destroys his promise, making it merely illusory), citing *Century 21 American Landmark, Inc. v. McIntyre* (1980), 68 Ohio App.2d 126, 427 N.E.2d 534, syllabus.

{¶17} Englert's argument that her complete performance precluded Nutritional Sciences from changing the terms of the contest would be legally correct if the contest rules did not provide otherwise.[5] Englert has failed to direct our attention to a case in which a court has refused to give effect to a reservation of rights that is included in a contest's rules and regulations, and this court's independent research has failed to

[5] We note, as a practical matter, that the results of a simple Google search disclosed that promoters or sponsors of contests routinely include reservations of rights, similar to the one at issue here, in their rules and regulations. Thus, it would appear that Nutritional Sciences is in good contractual company. See, e.g., http://www.officemaxfeedback.com/SurveyTemporary.aspx?Template=Rules&Roles=User (last visited May 21, 2008); http://www.nbc15.com/biggestloser/misc/9089966.html (last visited May 21, 2008) and http://www.nbc.com/The_Biggest_Loser/dietcenter/zip_n_steam/sweepstakes_rules.shtml (last visited May 21, 2008); http://www.mtv.com/onair/ffyr/discrimination/psa_contest_rules.jhtml (last visited 5/26/2008); http://www.pensacola.com/contestrules.aspx (last visited 5/19/2008); http://www.absolutepoker.com/vip/terms.asp (last visited 5/14/2008); http://www.eastbaymitsubishi.com/kick_to_win.htm?bhcp=1 (last visited 5/14/2008); http://www.boatohio.com/rules.shtml (last visited 5/19/2008); http://www.citylotto.com/rules.php (last visited 5/19/2008); http://www.psaid.org/Public?PublicContent.aspx?page=rules (last visited 5/19/2008); http://cfc.wjla.com/wjla/contests/honeybakedrules.html (last visited May 25, 2008); http://www.teacherspayteachers.com/contest/rules.php (last visited May 26, 2008); http://cottonellebkb.radweblive.com/sweeps_rules.html (last visited May 26, 2008); https://www.lowesgaragemakeover.com/app/rules.htm (last visited May 26, 2008); http://azsuperbowl.com/terms_conditions.aspx (last visited May 26, 2008); http://www.jostensforparents.com/sweepstakes-rules.asp (last visited May 26, 2008); http://www.nbc.com/Heroes/create_your_hero/rules.shtml (last visited May 26, 2008); http://www.usanetwork.com/series/criminalintent/sweepstakes/ultimatefan/rules.html (last visited May 26, 2008); http://www.firstcitizens.com/personal_services/cc_loans_mortgages/credit_card/bankmiles_rules_conditions.html (last visited May 26, 2008); http://ngm.nationalgeographic.com/ngm/bestwildlife/reg_form.html#Eligibility (last visited May 26, 2008); http://www.finessehaircare.com/contest/rockettescontest_rules.html (last visited May 26, 2008); http://discoversouthcarolina.com/exploresc/rules.aspx. (last visited May 26, 2008); http://missionformemories.ca/terms-and-conditions (last visited May 26, 2008).

disclose the same. And, given the reservation of rights' actual shelf life, an adoption of Englert's position would be tantamount to imposing an artificial expiration date. Thus, when considering the issue in light of the cases cited in the foregoing provision, we are precluded from finding that Englert's performance estopped Nutritional Sciences from exercising its reservation of rights.

{¶18} The following cases, which have analyzed the enforceability of reservation of rights in the context of pension plans (which are considered unilateral contracts), further buttress our conclusion: *Kemmerer v. ICI Americas., Inc*. (C.A.3 1995), 70 F.3d 281, 287-288 ("even when a plan reserves to the sponsor an explicit right to terminate the plan, acceptance by performance closes that door under unilateral contract principles [unless an explicit right to terminate or amend after the participants' performance is reserved]); *In re New Valley Corp.* (C.A.3 1996), 89 F.3d 143, 151; *Lund v. Citizens Financial Group, Inc.* (D.N.H. Sept. 30, 1999), Case No. CV 97-183-M; *Aiena v. Olsen* (S.D.N.Y.1999), 69 F.Supp.2d 521, 533 ("the sponsor's ability to amend as to those who have retired prior to any given amendment depends upon the clarity with which the plan reserves that right").

{¶19} We further note that in *Cardinal Stone Co., Inc. v. Rival Manuf. Co*. (C.A.6 1982), 669 F.2d 395, the sales contract between the parties included a reservation of rights provision that stated, "Buyer reserves the right to change or amend the specifications and to terminate this purchase order in whole or in part at any time* * * ." Id. at 396. Rival terminated the contract, and Cardinal filed suit alleging breach of contract, arguing that Rival could not arbitrarily terminate the contract, despite the

reservation of rights included in the contract. The Sixth Circuit disagreed, holding that the uniform commercial code's good faith requirement did not override the language of Rival's reservation of rights. The court explained that, "[f]rom the outset Cardinal was on notice that Rival had the unilateral right to terminate at anytime. It accepted this risk when it signed the agreement." Id. It further commented that while that risk had resulted in a hardship to Cardinal, it could not be "heard to complain of Rival's exercise of a right which Cardinal expressly relinquished." Id. The fact that *Cardinal Stone* did not involve a unilateral contract does not mean that it has no application to this case. The factors found by the *Cardinal Stone* court to be dispositive, i.e., unambiguous language, notice to the other party that the terms of the contract could be changed or the contract terminated at any time, and acceptance by that party of the risk involved, are all present here.

{¶20} To summarize, as the law of contracts has been applied in the context of contests, both the promoter/sponsor and the contestant are required to abide by all the rules and regulations set forth in the terms of the contest. In this case, the rules and regulations reserved to Nutritional Sciences the right to cancel or modify the terms of the contest at any time, and, by participating in the contest, Englert agreed to be bound by the same. The language of the contest is plain and unambiguous, and, thus, needs no interpretation. Nor is there any legal basis to excise the reservation of rights from the contract. Thus, in the final analysis, Nutritional Sciences' act of changing the amount of the prize was not a breach of contract, but, rather, the exercise of its contractual right. This court, once again, reiterates that we sympathize with Englert and understand her

disappointment, but the law simply does not provide her with any legal redress. Accordingly, we overrule Englert's first, second, and third assignments or error.

{¶21} In her fourth and fifth assignments of error, Englert challenges the trial court's decision to find in favor of Nutritional Sciences' on her claim for unauthorized use of likeness and invasion of privacy.

{¶22} Englert's claim for unauthorized use of likeness is premised upon R.C. 2741.02(A), which provides, in pertinent part, "a person shall not use any aspect of an individual's persona for a commercial purpose during the individual's lifetime or for a period of sixty years after the date of the individual's death." One statutory exception, relevant to our discussion, is when the person seeking to use another's persona obtains "written consent" from that individual. R.C. 2741.02(B). " 'Written consent' includes written, electronic, digital, or any other verifiable means of authorization." R.C. 2741.01(F). In this case, there is no question that Englert gave her consent to Nutritional Sciences, and, therefore, her claim for unauthorized use of likeness fails. For this same reason, her claim for invasion of privacy also fails. See, e.g., *Morenz v. Progressive Cas. Ins. Co*., Cuyahoga App. No. 79979, 2002-Ohio-2569, at ¶33; *Schlessman v. Schlessman* (1975), 50 Ohio App. 2d 179, 181. Thus, Englert's fourth and fifth assignments of error are overruled.

{¶23} In her sixth assignment of error, Englert contends that Nutritional Sciences "misrepresented material facts with knowledge of the falsity of such facts, including the amount of prize money it intended to pay Challenge runners up, with the intent of misleading Challenge participants." (Englert's brief at 13.) Englert asserts that Nutritional

Sciences' "knowledge of the falsity" is evidenced by the fact it failed to notify her of the reduced prize amount until after she completed her performance, and after it had chosen the winners of the contest. Id. For several reasons, however, this argument fails.

{¶24} To prove fraud, a plaintiff must demonstrate: (1) a representation; (2) which is material to the transaction at hand; (3) 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; (4) with the intent of misleading another into relying upon it; (5) justifiable reliance upon the representation; and (6) a resulting injury proximately caused by the reliance. *Williams v. Aetna Fin. Co.* (1998), 83 Ohio St.3d 464, 475; *Gaines v. Preterm-Cleveland, Inc.* (1987), 33 Ohio St.3d 54, 55.

{¶25} Additionally, a claim of fraud cannot be predicated upon promises or representations relating to future actions or conduct. *Hancock v. Longo* (Oct. 14, 1999), Franklin App. No. 98AP-1518. "Representations concerning what will occur in the future are considered to be predictions and not fraudulent misrepresentations." *Assoc. for Responsible Development v. Fieldstone Ltd. Partnership* (Nov. 13, 1998), Montgomery App. No. 16994. The exception to this rule is when the person:

> *** who makes his promise of future action, occurrence, or conduct, and who *at the time he makes it*, has no intention of keeping his promise. In such case, the requisite misrepresentation of an existing fact is said to be found in the lie as to his existing mental attitude and present intent.

Tibbs v. National Homes Constr. Corp. (1977), 52 Ohio App.2d 281, 287 (Emphasis *sic*).

{¶26} In this case, Englert does not allege that, at the time Nutritional Sciences initially promoted the contest and advertised the amount associated with the prize for the

runner up, it knew it would not honor that amount. And, in fact, Zeune's deposition testimony demonstrates just the opposite. (Zeune Depo. at 25.)

{¶27} But even if there was a misrepresentation, we do not find that Englert has shown that she justifiably relied upon the same. To demonstrate reliance, Englert was required to show that the representation by Nutritional Sciences was material to her decision to enter the contest or continue her performance therein. Putting aside our previous determination that Nutritional Sciences' act of changing the prize amount was a valid exercise of its reservation of rights, we have difficulty understanding how Englert relied upon the advertised prize amount when she had no guarantee that she would win the contest, let alone, be awarded a specific prize amount.

{¶28} Based on the foregoing, we do not find that Englert has demonstrated fraud, and, thus, we overrule her sixth assignment of error.

{¶29} In her seventh assignment of error, Englert argues that the trial court erred by granting summary judgment in favor of Nutritional Sciences on her claims that it violated the Ohio Consumer Sales Practices Act ("CSPA"). Specifically, Englert alleges that Nutritional Sciences violated R.C. 1345.02 "by making misrepresentations regarding the prize money that would be awarded to [her] as the Challenge runner-up in her age group." (Englert's brief at 14.) She also contends that it violated R.C. 1345.03(A) and (B)(1) by taking advantage of her.[6] For the following reasons, we disagree.

{¶30} Citing to no specific subsection of R.C. 1345.02, Englert appears to rely generally upon that statute's subsection, which provides:

[6] We note that Englert's brief is not entirely clear "how" she was taken advantage of by Nutritional Sciences.

> Without limiting the scope of division (A) of this section, the act or practice of a supplier in representing any of the following is deceptive:
>
> (1) That the subject of a consumer transaction has sponsorship, approval, performance characteristics, accessories, uses, or benefits that it does not have;
>
> (2) That the subject of a consumer transaction is of a particular standard, quality, grade, style, prescription, or model, if it is not;
>
> (3) That the subject of a consumer transaction is new, or unused, if it is not;
>
> (4) That the subject of a consumer transaction is available to the consumer for a reason that does not exist;
>
> (5) That the subject of a consumer transaction has been supplied in accordance with a previous representation, if it has not, except that the act of a supplier in furnishing similar merchandise of equal or greater value as a good faith substitute does not violate this section;
>
> (6) That the subject of a consumer transaction will be supplied in greater quantity than the supplier intends;
>
> (7) That replacement or repair is needed, if it is not;
>
> (8) That a specific price advantage exists, if it does not;
>
> (9) That the supplier has a sponsorship, approval, or affiliation that the supplier does not have;
>
> (10) That a consumer transaction involves or does not involve a warranty, a disclaimer of warranties or other rights, remedies, or obligations if the representation is false.

She does, however, specifically assert violations under R.C. 1345.03(A) and (B)(1), which state:

> (A) No supplier shall commit an unconscionable act or practice in connection with a consumer transaction. Such an unconscionable

> act or practice by a supplier violates this section whether it occurs before, during, or after the transaction.
>
> (B) In determining whether an act or practice is unconscionable, the following circumstances shall be taken into consideration:
>
> (1) Whether the supplier has knowingly taken advantage of the inability of the consumer reasonably to protect the consumer's interests because of the consumer's physical or mental infirmities, ignorance, illiteracy, or inability to understand the language of an agreement;

{¶31} Assuming without deciding that the facts of this case fall within the purview of Chapter R.C. 1345,[7] we do not find that Nutritional Sciences violated the OSPA. First, our previous determination that Nutritional Sciences' act of offering Englert a reduced prize amount was a valid exercise of its reservation of rights precludes us from now finding the same constitutes a violation of Chapter R.C. 1345. *Hurst v. Enter. Title Agency*, 157 Ohio App.3d 133, 144, 2004-Ohio-2307, at ¶36 ("Even if the CSPA was applicable in this case, summary judgment would still have been appropriate. The inclusion of a disclaimer in a contract, without more, clearly does not constitute a violation of the CSPA. Moreover, since we found that the specific exculpatory language utilized in this case was, as a matter of law, valid and enforceable, we are loathe to now hold that including this language in the contract was an unfair or deceptive act or an

[7] Englert purchased nutritional supplements from Nutritional Sciences and she received its product; she is not claiming that any representations made in relation to the actual sale of those products violated the OSCPA. Because Englert purchased those products, she was eligible to enter the contest, which is the genesis of her complaint. To enter the contest, Englert did not pay an additional fee, nor was she required to enter the contest. The contest's judges selected the winners based on body transformation. Although to compete, Englert was required to purchase Nutritional Sciences' products, as well as adhere to the prescribed physical regimen, it is axiomatic that body transformation occurs through one's own efforts. Hence, Englert's body transformation, which earned her declaration as the runner-up for her age group, cannot accurately be characterized as an "award by chance."

unconscionable act or practice."); see, generally, *McPhillips v. United States Tennis Ass'n Midwest*, Lake App. No. 2006-L-187, 2007-Ohio-3594.

{¶32} Putting aside the existence of the reservation of rights, the facts, as presented, do not appear to fall within any of acts or practices set forth in R.C. 1345.02(A)(1)-(10). Nor can we find a violation under R.C. 1343.03(B)(1), as the record is void of any dispute concerning Englert's physical or mental abilities. *Martin v. GMAC*, 160 Ohio App. 3d 19, 25, 2005-Ohio-1349 ("Under subsection (B)(1), the focus is on whether the consumer lacks the physical or mental ability to protect himself or herself."). Thus, given that the facts of this case do not support finding a violation under the sections of the CSPA plead and argued by Englert, the trial court did not err in granting summary judgment.

{¶33} In addition, we are also persuaded by Nutritional Sciences' argument that the facts of this case do not resemble any of the scenarios specifically outlined in O.A.C. 109:4-3-06, which sets forth acts or practices that violate Chapter R.C. 1345 in connection with the award of prizes. We find subsection (D)(3) especially significant. That section provides:

> (D) It shall be a deceptive act or practice in connection with a consumer transaction for a supplier to in any way notify any consumer or prospective consumer that the consumer has:
>
> * * * *
>
> (3) Been selected, or is eligible, to win a prize or receive anything of value *unless the supplier clearly and conspicuously discloses to the consumer any and all conditions* necessary to win the prize or receive anything of value.

(Emphasis added.) And, here, the rules of the contest clearly and conspicuously provided that Nutritional Sciences could change the terms of the contest.

{¶34} Based on the foregoing, we conclude that Nutritional Sciences did not violate Chapter R.C. 1345, and overrule Englert's seventh assignment of error.

{¶35} To surmise, we conclude that Nutritional Sciences' exercise of its reservation of rights was not a breach of contract, a fraudulent act, nor did the same constitute a violation of the OSCPA. We further conclude that Nutritional Sciences' did not violate R.C. 2741.02, nor can it be liable to Englert for invasion of privacy because she gave Nutritional Sciences her consent to use her name and likeness when she entered the contest. This court again reiterates the fact that we appreciate Englert's disappointment, but the law simply does not provide her with any means of legal redress.

{¶36} Accordingly, we overrule all of Englert's assignments of error moot, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BROWN, J., concurring separately in part.

TYACK, J., dissenting in part and concurring in part.

BROWN, J., concurring separately in part.

{¶37} I concur with the lead opinion that Nutritional Sciences' reservation of the right to terminate the contract at any time precludes recovery on the contract, but for a different reason. I cannot agree that Nutritional Sciences' rights were not unfettered. The lead opinion construes the language of the rules and regulations to mean that Nutritional Sciences could only cancel the contest or make changes at any time "before" a winner

claimed their prize. Here, Englert was notified by e-mail that she was a winner. She was subsequently notified by letter that the prize amount was less than the amount originally advertised, and that to claim her prize she must sign and return the letter. No evidence was presented that Englert could have claimed her prize prior to receiving the letter instructing her to sign and return that letter to claim the prize. Since Nutritional Sciences could make changes "at any time," it retained unfettered discretion to determine the extent of its own performance, making the promise illusory. See *Imbrogno v. MIMRx.COM, Inc.,* Franklin App. No. 03AP-345, 2003-Ohio-6108, at ¶8 (contract is illusory when "by its terms the promisor retains an unlimited right to determine the nature or extent of his performance; the unlimited right, in effect, destroys his promise and thus makes it merely illusory").

TYACK, J., concurring in part and dissenting in part.

{¶38} Because the majority holds that a party can unilaterally modify contractual terms after complete performance by the other party, I respectfully dissent. I would overrule the sixth assigned error (fraud), sustain the seventh assigned error (CSPA), and remand the case for further proceedings.

BREACH OF CONTRACT

{¶39} The issue in this case is not *whether* Nutritional Sciences was allowed to change the prizes of the contest, but rather *when*—at what point they were prohibited from doing so. Contests have rules. Entrants must agree to those rules if they want to compete for the prize. But rules have limits. Although Nutritional Sciences did retain the right to change the rules, the right to do so expired along with the contest itself. Once the

contest was over—i.e., they announced the winners—the parties' duties were fixed. The majority mischaracterizes the end of the contest as being when prizes are claimed. I disagree.

{¶40} Nutritional Sciences tried to reserve the right to alter the terms of the contest at any time. The majority says, prudently, that these rights to change the terms "were not unfettered." (Ante, at 9.) However, by limiting Nutritional Sciences' power to change the contest's terms only "before a winner claimed her prize," the majority has basically made the right to change the contest unfettered. Nutritional Sciences had the right to change the rules up until the time they awarded the prizes, an occurrence over which they had exclusive control.

{¶41} As the majority points out, courts have historically treated contests as unilateral contracts. One of the fundamental rules of unilateral contracts (which differs from the rule for bilateral contracts) is that the terms of the contract cannot be modified after the offeree has begun to perform. *Harwood v. Avaya Corp.* (S.D.Ohio 2007), No. C2-05-828 (citing Restatement of the Law 2d, Contracts, Section 25, 45, Comment *d*; Corbin on Contracts, Section 63; 1 Williston on Contracts [Rev.Ed. 1990], Section 5:13, 691-692). Because the issue of unilateral contract modification is well-settled, the fact that there is no controlling case law on point is not dispositive here. Moreover, the majority's reliance on the cases it cites is misplaced. Those cases only speak to the enforceability of contest disclaimers in general. They do not hold that a party can modify the terms to a contest after full performance by the other party. See, e.g., *McBride v. New York City Off-Track Betting Corp.* (N.Y.1978), 410 N.Y.S.2d 868; *James v.*

McDonald's Corp. (C.A.7, 2005), 417 F.3d 672. The issue in *James* was whether the contest's arbitration provision was enforceable, not whether the defendant could change the prize amounts after the contest was over.

{¶42} There is more than ample case law, directly on point, which differs from the majority's analysis. See, e.g., *First Texas Sav. Assn. v. Jergins* (Tex.App. 1986), 705 S.W.2d 390 (holding that a contest winner was not bound by changes to the contest occurring after the winner completed the requested performance); *Minton v. F.G. Smith Piano Co.* (1911), 36 App.D.C. 137 (holding that an advertised offer of a reward for the performance of a specified act became a binding contract between the advertiser and the individual who performed the act requested); *Dorman v. Publix-Saenger-Sparks Theatres, Inc.* (Fla. 1938), 184 So. 886 (holding that since the act requested by the theater owner resulted in his own benefit, the request was regarded as an offer to enter into a valid and binding contract); *St. Peter v. Pioneer Theatre Corp.* (Iowa 1940), 291 N.W. 164 (holding that the act of the contestant in registering and appearing for the drawing constituted consideration for a valid contract); *Schreiner v. Weil Furniture Co.* (La.App. 1953), 68 So.2d 149 (holding that when a contestant performs all the requirements of an offer in accordance with its published terms, a valid and binding contract is created); *Chenard v. Marcel Motors* (Me.1978), 387 A.2d 596 (holding that a golfer who paid an entrance fee in a tournament and shot a hole-in-one accepted the offeror's unilateral offer obligating the offeror to make good on his promise to give a new car to any golfer who shot a hole-in-one).

{¶43} Nothing in this case distinguishes the "Quarter Million Dollar Challenge" from any other contest in which courts held that the contest holder made an offer to enter into a unilateral contract. Therefore, the general rule that applies to unilateral contracts should apply here—that Nutritional Sciences's right to modify the terms of the contest expired with the contest itself.

{¶44} The trial court's analysis was also incorrect. Although the trial court found that there was a valid contract, the court determined that the contract was formed at the time Ms. Englert *entered* the contest. This effectively makes the contest a bilateral contract, which changes the rules regarding modification:

> Defendants offered prizes to winning contestants of the fitness challenge. Plaintiff accepted the offer by completing the registration forms and purchased defendants' products pursuant to the terms of the contest. Defendants received a benefit because plaintiff purchased their products, thus amounting to consideration. Thus, once plaintiff completed performance according to the contest rules, a binding contract existed.

(Decision, 6.)

{¶45} The trial court's conclusion is incorrect, because an offer to enter into a unilateral contract can only be accepted by performance. See *Bretz v. Union Central Life Ins. Co.* (1938), 134 Ohio St. 171, 175. Englert did not perform the requested act by merely entering defendants' contest. Although the defendants did receive some benefit by her mere entrance into the contest, it would have been impossible for her to win before the contest had even started. By this reasoning, it can only be that the contract was formed at the time Englert tendered her performance and the defendants declared her the second-place winner.

{¶46} Any other interpretation of the parties' promises and performances renders the contract illusory, and therefore unenforceable at all. A promise is illusory when, by its terms, the promisor retains unfettered discretion to determine the nature or extent of his own performance; this unlimited right, in effect, destroys his promise, making it merely illusory. *Imbrogno v. Mimrx.com, Inc.*, Franklin App. No. 03AP-345, 2003-Ohio-6108, at ¶8 (citing *Century 21 American Landmark, Inc. v. McIntyre* [1980], 68 Ohio App.2d 126, 427 N.E.2d 534, syllabus); 1 Williston on Contracts (3 Ed.1957) 140, Section 43. An apparent promise, which, according to its terms makes performance optional with the promisor is in fact no promise at all. *Andreoli v. Brown* (1972), 35 Ohio App.2d 53, 55, 299 N.E.2d 905 (quoting 1 Restatement of the Law, Contracts [1925] Section 2 and Comment *b*). Although this promise is said to be illusory, if a promise is illusory, the contract is unenforceable. *Imbrogno*, ibid; 17 American Jurisprudence 2d (1964) 419, Contracts, Section 79.

{¶47} Contract law is intended to allow parties to enter into their own agreements freely, and to have those agreements be enforceable by law or equity. See, e.g., *Corporex Dev. & Constr. Mgt., Inc. v. Shook, Inc.*, 106 Ohio St.3d 412, 2005-Ohio-5409, 835 N.E.2d 701, ¶6 (holding that tort remedies are generally not available for an ordinary breach of contract). Defendants contend that because they did not make as much money as they had projected, they could not have awarded the $250,000. In effect, their argument is that because they did not have the money to pay, they were acting in good faith. Regardless of whether this is true or not, "a good-faith breach is a breach

nonetheless." *Sowards v. Norbar, Inc.* (1992), 78 Ohio App.3d 545, 605 N.E.2d 468, 474. For these reasons, I would sustain the first, second, and third assignments of error.

FRAUD & CONSUMER SALES PRACTICES ACT

{¶48} In the sixth assigned error, Englert challenges the trial court's finding that Nutritional Sciences' contest did not constitute fraud.

{¶49} The elements of fraud are: (1) a misstatement or omission of a material fact, (2) intended to induce reliance, (3) actual and justifiable reliance thereon, and (4) damages proximately caused thereby. See, e.g., *Burr v. Bd. of Cty. Commrs. of Stark Cty.* (1986), 23 Ohio St.3d 69, 491 N.E. 2d 1101. It is not enough that a speaker merely made a false statement; the statement must have been made either with knowledge that it was false, or intent to deceive the listener. See *Pumphrey v. Quillen* (1956), 165 Ohio St. 343, 345, 135 N.E.2d 328 ("The required intent is indeed present in cases where the speaker believed his statement to be false, as also in cases where the representation is made without any belief whatsoever of its truth or falsity.").

{¶50} The essence of Englert's argument for fraud is that Nutritional Sciences CEO Rodney Zeune knew that the company did not have enough money to award the prizes promised, but continued the contest anyway. Although the facts support this to some extent, there is no evidence demonstrating that Zeune knew the statements were false at the time they were made. Thus, it does not appear that there was any intent to deceive on Zeune's part.

{¶51} Zeune testified that at the beginning of the contest, he fully intended to award the prize money as advertised. (Zeune Depo., at 25.) Whether Zeune's statement

was truthful or not is largely irrelevant, because the plaintiff did not offer any evidence to the contrary. Thus, although Zeune's intent would ordinarily be a fact question for the jury, there is no dispute to submit to the jury.

{¶52} The sixth assigned error I would overrule.

{¶53} The seventh assigned error challenges the trial court's ruling that Nutritional Sciences was not liable under the CSPA. I believe the facts suggest that even though Zeune might have lacked the requisite intent to constitute fraud, the company conducted business in a deceptive manner.

{¶54} The Ohio Consumer Sales Practices Act prohibits "suppliers" of goods and services from engaging in deceptive or unfair sales tactics before, during, or after any "consumer transaction." R.C. 1345.03(A); *Hanna v. Groom*, Franklin App. No. 07AP-502, 2008-Ohio-765, at ¶33. " 'Consumer transaction' means a sale, lease, assignment, award by chance, or other transfer of an item of goods, a service, a franchise, or an intangible, to an individual for purposes that are primarily personal, family, or household, or solicitation to supply any of these things." R.C. 1345.01. " 'Supplier' means a seller, lessor, assignor, franchisor, or other person engaged in the business of effecting or soliciting consumer transactions, whether or not the person deals directly with the consumer." R.C. 1345.01(C).

> In determining whether an act or practice is unconscionable, the following circumstances shall be taken into consideration:
>
> (1) Whether the supplier has knowingly taken advantage of the inability of the consumer reasonably to protect the consumer's interests because of the consumer's physical or mental infirmities, ignorance, illiteracy, or inability to understand the language of an agreement;

> (2) Whether the supplier knew * * * that the price was substantially in excess of the price at which similar property or services were readily obtainable * * *;
>
> (3) Whether the supplier knew * * * of the inability of the consumer to receive a substantial benefit from the subject of the consumer transaction;
>
> (4) Whether the supplier knew * * * that there was no reasonable probability of payment of the obligation in full by the consumer;
>
> (5) Whether the supplier required the consumer to enter into a consumer transaction on terms the supplier knew were substantially one-sided in favor of the supplier[.]

R.C. 1345.03(B).

{¶55} Recovery under the CSPA requires that the supplier acted knowingly and unconscionably. *Hanna*, supra (citing *Suttle v. DeCesare,* Cuyahoga App. No. 81441, 2003-Ohio-2866, at ¶53 appeal not allowed, 100 Ohio St.3d 1425, 2003-Ohio-5232). "Knowledge" means actual awareness, which may be inferred from objective manifestations indicating that the supplier was aware of the conduct complained of. *Hanna*, ibid. (quoting *Suttle,* at ¶53); See *Charvat v. Ryan*, 116 Ohio St.3d 394, 2007-Ohio-6833, 879 N.E.2d 765, paragraph three of the syllabus ("To establish a *knowing* violation of R.C. 1345.09, for an award of attorney's fees, a plaintiff need prove only that the defendant acted in a manner that violated the [CSPA], and need not prove that the defendant knew that the conduct violated the law.") (Emphasis sic.) Also, it is important to note that a plaintiff need not prove the defendant acted intentionally to recover under the CSPA.

{¶56} Defendants do not dispute any of the facts alleged against them, but have maintained the position that because they reserved the right to change the rules of the contest *at any time*, nothing was ever deceptive, unfair, or unconscionable. The irony of defendants' position is that the very act of reserving sole discretion to alter the terms of a contract to their own benefit is per se unfair and unconscionable.

{¶57} Mr. Zeune testified in his deposition that in the early stages of the contest he had doubts about his company's ability to pay out the prize money they advertised. (Zeune Depo. 25–27.) But instead of doing the honorable thing—telling the contestants that they did not have enough money to pay the advertised prizes—Mr. Zeune decided to keep quiet about Nutritional Sciences's insolvency, and milked its customers for whatever cash they could. This amounted to a deceptive sales tactic, which Mr. Zeune and Nutritional Sciences used to sell fitness and nutritional supplements.

{¶58} Defendants were engaged in the business of providing fitness products and services to the general public. Thus, defendants are "suppliers" within the meaning of the CSPA. Englert purchased some of defendant's fitness products so she could have a chance at winning the contest. This was a "consumer transaction" within the meaning of the CSPA. Defendants used deceptive and unfair sales tactics when they advertised the contest to induce sales of their products under the guise that they would be awarding the prize(s) advertised, and continued the contest with knowledge that they would be unable to pay the advertised prize(s).

{¶59} To be fair, defendant Zeune testified that at the beginning of the contest he fully intended on awarding the prizes as advertised. (Zeune Depo., at 26.) Whether

Zeune made this statement in good faith or not is questionable, because his testimony clearly suggests that he was concerned about his company's financial status following the loss of a major order from Bath and Body Works. (Id., at 25–27.) Furthermore, Zeune stated that by the fourth or fifth week of the contest he knew that the advertised prize money would not be available. (Id. at 26.) Defendants argue, however, that because Zeune did not enter into the contest with the specific intent to be deceptive or unconscionable, he is not liable under the CSPA. But the CSPA does not require intent; rather, it prohibits unfair or deceptive sales practices at any point in a consumer transaction—before, during, or after. See R.C. 1345.02(A); see, also, *Saraf v. Maronda Homes, Inc.*, Franklin App. No. 02AP-461, 2002-Ohio-6741, at ¶43. Thus, based on Zeune's deposition, despite the fact that he may have lacked the *intent* necessary for fraud, he certainly demonstrated the requisite *knowledge* to be liable under the CSPA. Because the defendants offered prize money they knew they could not pay, to induce consumer transactions, defendants are liable under the CSPA.

{¶60} In addition, to the extent the defendants argue that the contest rules permitted them to change said rules, and award whatever prizes they saw fit—or, indeed, no prize at all, as counsel stated at oral argument—defendants have also violated R.C. 1345.03(B)(5), which prohibits suppliers from entering into consumer transactions with contract terms that unreasonably favor the supplier.

{¶61} Thus, I would sustain the seventh assignment of error.

{¶62} I concur with the majority's disposition of the fourth and fifth assigned errors relating to invasion of privacy. Ms. Englert clearly consented to the use of her

photographs. Beside that point, if Nutritional Sciences had not breached the contract, Englert would not have withdrawn her consent. Allowing her to collect for invasion of privacy would really be a back-door to recovering for breach of contract. Moreover, there is generally no recovery in tort where the parties' relationship was governed by a contract. See *Corporex*, supra.

{¶63} Accordingly, I dissent in part.

_____