

[Cite as *Giffin v. Crestview Cadillac*, 2009-Ohio-6569.]

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

Robert E. Giffin et al.,	:	
Plaintiffs-Appellants,	:	
v.	:	No. 09AP-278 (C.P.C. No. 05CVH11-13189)
Crestview Cadillac et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

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D E C I S I O N

Rendered on December 15, 2009

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*Robert G. Kennedy*, for appellants.

*Charley Hess*, for appellees.

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APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Plaintiffs-appellants, Robert E. and Diana M. Giffin, appeal from a judgment of the Franklin County Court of Common Pleas granting summary judgment in favor of defendants-appellees, Crestview Cadillac, Inc. ("Crestview"), Larry Graves, Jim Johnson, Ralph Yanni, and Chase Auto Finance. For the following reasons, we affirm in part and reverse in part.

{¶2} In late May 2005, the Giffins began looking for a new car. They visited Crestview, where they met Graves, a salesperson for Crestview. Graves showed them a 2005 Cadillac SRX and escorted them on a test drive. Graves also explained that the

Giffins could obtain 2.9 percent financing and a \$2,000 rebate from the manufacturer if they bought the SRX.

{¶3} According to Robert Giffin ("Giffin"), he told Graves that he and his wife planned to take a vacation out West, and they intended to purchase a new car after they returned. Giffin claims that Graves responded that, "[Crestview] would hold the title and title the vehicle to [the Giffins] with 5,000 miles on the vehicle to compensate for our trip out West." Giffin Aug. 30, 2006 affidavit, at ¶7 (attached to plaintiffs' memorandum contra to defendant's motion for summary judgment as to plaintiffs' remaining claims). Graves' response makes little sense until viewed in context. As the Giffins later explained in their depositions, Giffin wanted to claim the cost of the SRX as a business expense on the couple's taxes. The Giffins own a consulting business, and Giffin often drives to speaking engagements. However, Giffin faced a dilemma:

[T]o claim a car on business expense only, you have [to have] 80 percent business miles on it [ ] [.] And so putting 5,000 miles on for personal, which is what I estimated [for the vacation out West], to get 80 percent business miles, I would have to have another 20,000 miles on the car. There's no way, in six months time, I would have had 20,000 [ ] business miles.

Giffin deposition, at 19-20. Thus, Graves' alleged suggestion that Crestview hold the title and delay reporting the mileage until the Giffins returned from their trip would allow the Giffins to benefit from personal use of the car without disclosing that use to the Internal Revenue Service ("IRS"). After the trip, the Giffins could dedicate the car to business use and thereafter claim the car as a business expense without having to account for the 5,000 miles of personal use.

{¶4} Graves recollects his conversation with Giffin differently. According to Graves, Giffin first brought up the mileage issue, telling Graves that he wanted the title to state that the SRX's mileage was just over 5,000 miles. Graves remembers Giffin also saying that he needed the title to reflect that the SRX had over 5,000 miles for tax purposes. Graves refused to comply with Giffin's wishes, and he told Giffin that he would not falsify the odometer disclosure statement.

{¶5} Pleased with the SRX and Graves' alleged offer to delay reporting the mileage, the Giffins offered to purchase the car for \$46,000. Jim Johnson, Crestview's sales manager, countered the Giffins' offer with an offer of his own—\$49,200 (which included the \$2,000 rebate), plus tax and title fees. The Giffins left Crestview without buying the SRX.

{¶6} On May 31, 2005, Graves telephoned the Giffins and told them that if they wanted to take advantage of the 2.9 percent financing and \$2,000 rebate, then they need to buy the SRX that day. The Giffins returned to Crestview to negotiate the purchase of the SRX. According to Giffin, during these negotiations, Graves stated that the invoice price of the SRX was \$51,191 and, by selling the car for \$51,200 (before the \$2,000 rebate), Crestview would only make a \$9 profit on the sale. Also during the negotiations, Diana Giffin expressed concern that the SRX did not have a bike rack receiver because she and her husband wanted to use the car to transport their bicycles. Graves spoke with Johnson, who agreed to include installation of a bike rack receiver in the cost of the SRX. At the end of the evening, Diana Giffin signed the worksheet that contained the terms the Giffins and Graves had negotiated. Neither Johnson nor any other Crestview employee signed the worksheet to signal the dealership's acceptance of the deal. However,

according to the Giffins, both Graves and Johnson congratulated Diana Giffin on the purchase of her new car.

{¶7} On June 4, 2005, the Giffins returned to Crestview to complete additional paperwork for the new car. They met with Johnson, who told them that Crestview had forgotten to submit Diana Giffin's paperwork to General Motors on May 31, 2005. As the manufacturer's offer of 2.9 percent financing and a \$2,000 rebate had expired on that date, Diana Giffin could no longer obtain either incentive. However, according to Giffin, Johnson offered to "take the original price of forty-nine two, deduct \$300 for the employee discount to give me better pricing and reduce that on down further and give me the difference between 2.9 percent and 3.9 percent financing and still throw in the bike rack [receiver]." Giffin deposition, at 15.

{¶8} Johnson then introduced the Giffins to Ralph Yanni, Crestview's finance manager, to finalize the purchase of the SRX. While reviewing the paperwork with Yanni, Giffin brought up the mileage issue. Yanni balked at the suggestion that he record anything other than the actual mileage at the time of the sale on the odometer disclosure statement. Yanni told Giffin that he thought Giffin was trying to cheat the federal government. At that point, Johnson intervened and discussed the matter with Giffin. As Giffin later testified in his deposition:

I said look, we're going to take a trip out West. The trip tic we had showed about 5,000, 5,100 miles. \* \* \* I said we have a rental car going out West. I said I don't like the rental car going out West because it's not big enough and we're taking our two grandkids, so if there's some way I can buy this car and you put 5,000 miles on the title when I buy it, that's one way to do it. The second way to do it is lease the vehicle to me for 30 days and I'll buy it when I come back, and Mr. Johnson came up with the third way.

He says well, we will just hold the title for 30 days. When you come back, you call us, and we'll put the [ ] mileage on the vehicle at that time. \* \* \* And he says when you get back from your trip, we can hold the title by law for 30 days, give us a call, we'll record the title at that time.

Giffin deposition, at 17-18.

{¶9} Johnson's recollection of this conversation differs from Giffin's recounting of it. According to Johnson, he told the Giffins that if they wanted to take possession of the SRX that day, the odometer disclosure statement and bank documents would have to contain the actual mileage of the vehicle. Johnson agreed, however, to defer processing the deal until July 5, 2005. If Diana Giffin returned to Crestview prior to that date, Crestview would create new documents that would contain the mileage on the vehicle at the time of her return. If Diana Giffin did not return, Johnson would process the original paperwork.

{¶10} Appeased by Johnson's plan, Giffin allowed the deal to go forward. Ultimately, both Diana Giffin and Yanni signed a sales contract for the SRX, whereby Diana Giffin purchased the car for \$48,940.15, plus tax and title fees. That same day, Diana Giffin signed a promissory note and security agreement in which she borrowed money to buy the car from J.P. Morgan Chase Bank, N.A., at an annual percentage rate of 3.9 percent. The Giffins then took possession of the SRX and subsequently drove it on their vacation out West.

{¶11} The Giffins returned from their trip on July 1, 2005. The next day, Diana Giffin telephoned Crestview, intending to tell Graves, Johnson, or Yanni the number of miles on the odometer. At that time, the odometer registered approximately 5,100 miles. Because both Graves and Johnson were on vacation, Diana Giffin spoke with Yanni, who

told her that, "it's already taken care of." Diana Giffin deposition, at 23. Indeed, Yanni had already filed an application for a certificate of title with the Franklin County Clerk of Courts on the Giffins' behalf. In the accompanying odometer disclosure statement, Yanni had recorded the SRX's mileage as it existed at the time of sale. Thus, the title the Giffins later received in the mail listed the SRX's mileage as 182 miles, not 5,100 miles.

{¶12} On November 23, 2005, the Giffins filed suit against defendants, alleging claims for violation of the Consumer Sales Practices Act ("CSPA"), R.C. 1345.01 et seq., negligent misrepresentation, and fraud in the inducement. The Giffins also asked the trial court for a judgment declaring that defendants' actions constituted violations of the CSPA. After answering the complaint, defendants moved to dismiss Giffin, arguing that he was not a real party in interest. In support of their motion, defendants pointed out that Diana Giffin was the sole purchaser and owner of the SRX. Consequently, defendants contended, only Diana Giffin qualified as a "consumer" who could assert a CSPA claim and only Diana Giffin could suffer direct injury as a result of the alleged negligent and/or fraudulent misrepresentations.

{¶13} Defendants followed their motion to dismiss with a motion for partial summary judgment. In this second motion, defendants argued that the Giffins could not recover under the CSPA because they did not engage in a "consumer transaction." Defendants directed the trial court to portions of the Giffins' deposition testimony wherein they acknowledged that they intended to use the SRX for business upon their return from their vacation. Because the CSPA only protects individuals who participate in transactions for "primarily personal, family, or household" purposes, R.C. 1345.01(A),

defendants argued that the Giffins, who bought the SRX for primarily business reasons, could not maintain their CSPA claims.

{¶14} The Giffins filed memoranda contra to both motions. Additionally, the Giffins moved for a declaratory judgment, asking the trial court to declare that defendants violated the CSPA.

{¶15} On March 29, 2007, the trial court issued a decision granting defendants' motion to dismiss Giffin, as well as defendants' motion for partial summary judgment. Because the trial court granted summary judgment to defendants on the CSPA claims, it found the Giffins' motion for declaratory judgment moot and denied it.

{¶16} Thereafter, defendants moved for summary judgment on the remaining claims. Defendants argued that the record did not contain evidence to support Diana Giffin's claims that defendants negligently and/or fraudulently misrepresented that: (1) the Giffins would receive a 2.9 percent annual percentage rate to finance the purchase price of the SRX, (2) the Giffins would receive a bike rack receiver without any additional charge, (3) Crestview would only attain a \$9 profit on the deal, and (4) Crestview would hold the paperwork until the Giffins returned from vacation and report the mileage then on the SRX on the odometer disclosure statement.<sup>1</sup> The trial court also granted that motion, rendering judgment in defendants' favor on February 23, 2009.

{¶17} The Giffins now appeal, and they assign the following errors:

[1.] The Trial Court Erred in its Decision of March 29, 2007 in Finding Appellant Robert E. Giffin was Not a Real Party [in] Interest Under Civil Rule 17(A).

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<sup>1</sup> All four alleged misrepresentations serve as grounds for the negligent misrepresentation claim. However, the Giffins based their fraudulent inducement claim solely on Johnson's alleged representation that Crestview would hold the paperwork and report the mileage of the vehicle after the Giffins returned from their vacation.

[2.] The Trial Court Erred as a Matter of Law when it Granted Appellees' Summary Judgment to Appellants' Allegations Under the Ohio Consumer Sales Practice[s] Act as There are Genuine Issues of Material Fact as to Whether the Act Has Been Violated by the Appellees.

[3.] The Court Erred in Granting Summary Judgment by Failing to Consider the Affidavits Attached to Appellants' Memorandum Contra to Appellees' Motion for Partial Summary Judgment.

[4.] The Trial Court Erred in its Decision of February 23, 2009 in Ruling Appellants' Exhibits 2 Through 7 Were Not Properly Authenticated Through Affidavits Pursuant to Rule 56(C).

[5.] The Trial Court Erred in Determining the Bike Receiver was Properly Installed.

[6.] The Trial Court Erred in Finding that Appellees Failed to Hold the Title as Promised to the Appellants.

[7.] The Trial Court Erred in Failing to Find the Representations That Appellee Graves Made Submitting There was Only \$9.00 Profit Being Made by the Dealer on the Vehicle.

[8.] The Trial Court Erred in Modifying the Terms of the Contract and Failed to Enforce the Terms of the Contract and in Effect Found Appellants' Motion for Declaratory Judgment to Interpret the Terms of the Contract Moot.

{¶18} We will first address the Giffins' second assignment of error, by which they argue that the trial court erred in granting defendants' summary judgment on the CSPA claims. We disagree.

{¶19} Appellate review of summary judgment motions is de novo. *Andersen v. Highland House Co.*, 93 Ohio St.3d 547, 548, 2001-Ohio-1607. " 'When reviewing a trial court's ruling on summary judgment, the court of appeals conducts an independent review of the record and stands in the shoes of the trial court.' " *Abrams v. Worthington*,

169 Ohio App.3d 94, 2006-Ohio-5516, ¶11 (quoting *Mergenthal v. Star Banc Corp.* (1997), 122 Ohio App.3d 100, 103). Civ.R. 56(C) provides that a trial court must grant summary judgment when the moving party demonstrates that: (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made. *Gilbert v. Summit Cty.*, 104 Ohio St.3d 660, 2004-Ohio-7108, ¶6.

{¶20} When seeking summary judgment on the ground that the nonmoving party cannot prove its case, the moving party bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on an essential element of the nonmoving party's claims. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. The moving party does not discharge this initial burden under Civ.R. 56 by simply making a conclusory allegation that the nonmoving party has no evidence to prove its case. *Id.* Rather, the moving party must affirmatively demonstrate by affidavit or other evidence allowed by Civ.R. 56(C) that the nonmoving party has no evidence to support its claims. *Id.* If the moving party meets this initial burden, then the nonmoving party has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmoving party does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party. *Id.*

{¶21} The CSPA empowers "consumers" to pursue their own private right of action for violation of R.C. 1345.02 or 1345.03, or any rule adopted pursuant to R.C. 1345.05. R.C. 1345.09. A "consumer" is "a person who engages in a consumer

transaction with a supplier." R.C. 1345.01(D). A "consumer transaction" is "a sale \* \* \* of an item of goods \* \* \* to an individual for purposes that are primarily personal, family, or household." R.C. 1345.01(A). Purchases of goods for primarily business purposes are not "consumer transactions." *Lesco v. Toyota of Bedford, Inc.*, 8th Dist. No. 86144, 2005-Ohio-6724, ¶15 (holding that the CSPA "does not apply to cars purchased or leased primarily for use in the individual's business").

{¶22} When deciding whether a consumer transaction exists, courts look to "the point in time when the parties have entered a binding agreement." *Tomes v. George P. Ballas Leasing, Inc.* (Sept. 30, 1986), 6th Dist. No. L-85-359. See also *Gugliotta v. Morano*, 161 Ohio App.3d 152, 2005-Ohio-2570, ¶35-36 (following and applying *Tomes*); *Couto v. Gibson, Inc.* (Feb. 26, 1992), 4th Dist. No. 1475 (same); *Jackson v. Krieger Ford, Inc.* (Mar. 28, 1989), 10th Dist. No. 88AP-1030 (same). Courts then examine the "objective manifestations" that the purchaser made during that time period regarding how he intended to use the purchased item. *Tomes*. See also *Jackson* (finding that the plaintiff's objective manifestations at the time of purchase led to the conclusion that the plaintiff purchased the vehicle for business use). In adopting the foregoing test, the *Tomes* court reasoned:

In most cases, the supplier has no control over the subsequent use of the product by the purchaser. It would seem unfair that the supplier should be held to a different classification of the character of a transaction due to the subsequent use of the product by the purchaser.

{¶23} In the case at bar, Diana Giffin acknowledged that during negotiations for the purchase of the SRX, the Giffins stated that they intended to use the car for business after returning from their vacation. In her deposition, Diana Giffin testified as follows:

A: Well, the thing that we wanted – we were going out West, and we wanted to use the car, you know, for ourselves then, but we wanted – he wanted to be able to use it for business when he came back, so we were concerned about the mileage we were going to put on it to go out West because it would have been personal miles.

\* \* \*

Q: What do you recall was said by anybody about the intended business use after you returned from vacation?

A: Well, it was just that we wanted – we wanted to be able to use it for business when we came back, but we couldn't do that with all the miles on it from our personal trip.

\* \* \*

Q: [I]f you took the title before you went out West and put 5,000 miles on it, you think you wouldn't be able to have an option –

A: Right. We wouldn't have the option of using it for business, and that's what we told them.

Diana Giffin deposition, at 19-21.

{¶24} Consistent with Diana Giffin's testimony, Yanni stated in his affidavit that Giffin told him that, "he wanted the title held and not recorded until they had returned from their trip \* \* \* so he could later drive the vehicle for business purposes and then claim on his federal income tax return the vehicle's use as a business vehicle and take advantage of certain deductions from his income." Yanni affidavit, at ¶5. Based upon Diana Giffin and Yanni's testimony, a reasonable finder of fact could come to but one conclusion—at the time the Giffins purchased the SRX, they objectively manifested their intention to use the SRX as a business car once they finished their trip out West. Therefore, the Giffins purchased the SRX for primarily business—not personal, family, or household—purposes.

{¶25} In arguing to the contrary, the Giffins rely heavily on the fact that they never actually used the SRX for business purposes. The Giffins contend that under *Jackson*, courts must apply the principal use test to determine whether a purchaser entered into a transaction for primarily business or personal purposes. The outcome of the principal use test depends upon how the owner of the vehicle uses it *after* purchase. Factors include "total time used for business versus total time used for personal activities, evidence of compensation for business use either from an employer or by way of deduction, as well as relative mileage." *Jackson*.

{¶26} While we recognize the validity of the principal use test, we conclude that it does not apply here. *Jackson* limited the application of the principal use test to those "transactions where the objective manifestations of the parties are unclear at the time of the agreement." The record in the case at bar contains sufficient evidence to discern the character of the transaction from the Giffins' objective manifestations at the time they purchased the SRX. Therefore, we need not resort to the principal use test to determine whether the Giffins purchased the SRX for primarily business or personal use.

{¶27} Next, the Giffins argue that they never said that they planned to use the SRX for business purposes; they just said that they wanted the *option* to use the SRX for business purposes. Essentially, the Giffins contend that, at the time they purchased the SRX, they remained undecided about how they would eventually use the car, and they merely wanted to preserve the option of using it primarily for business. The evidence contravenes the Giffins' argument. Diana Giffin unequivocally testified that the Giffins stated that they wanted to use the SRX for business after their vacation. While the Giffins also told Crestview employees that 5,000 personal miles would preclude them from

exercising the "option" of using the SRX as a business car, that statement does not indicate any uncertainty regarding how they intended to use the car. Rather, with that statement, the Giffins explained that 5,000 personal miles would impede them from accomplishing the option they had already chosen—to use the SRX as a business car.

{¶28} As the Giffins' arguments to the contrary are unavailing, we conclude that the Griffins purchased the SRX for primarily business reasons and, consequently, they cannot recover under the CSPA for any alleged misrepresentations made in the course of the purchase. Accordingly, we overrule the Giffins' second assignment of error.

{¶29} By the Giffins' third assignment of error, they argue that the trial court erred in disregarding the affidavits attached to their memorandum contra to defendants' motion for partial summary judgment. We disagree.

{¶30} In response to defendants' motion for summary judgment on the CSPA claims, the Giffins each submitted an affidavit in which they testified as to why they had purchased the SRX and how they had used the SRX after its purchase. The trial court found that these affidavits contradicted the Giffins' earlier deposition testimony, and the court refused to consider them.

{¶31} "An affidavit of a party opposing summary judgment that contradicts former deposition testimony of that party may not, without sufficient explanation, create a genuine issue of material fact to defeat the motion for summary judgment." *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, paragraph three of the syllabus. In the case at bar, Diana Giffin testified in her deposition that she and her husband planned to use the SRX as a business car after they returned from their vacation. However, Diana Giffin stated in her affidavit that, "the primary purpose for the purchase of the vehicle was for a

three-and-a-half week trip out West with our grandchildren *and for my personal use as my car had previously been sold.*" Diana Giffin Sept. 8, 2006 affidavit, at ¶1 (emphasis added) (attached to plaintiffs' memorandum contra to defendants' motion for partial summary judgment). Diana Giffin offered no explanation for why she testified to two different, inconsistent purposes for purchasing the SRX. Given this unexplained inconsistency, we conclude that the trial court did not err in finding that Diana Giffin's affidavit testimony failed to create any issues of fact that precluded summary judgment.

{¶32} Giffin also contradicted his earlier deposition testimony in his affidavit and failed to supply any explanation for the contradiction. Giffin admitted in his deposition that he drove the SRX approximately 300 miles for business purposes in 2005. Giffin deposition, at 23. Yet, in his affidavit, Giffin stated that, "[p]laintiffs never used the vehicle for business purposes." Giffin Sept. 8, 2006 affidavit, at ¶7 (attached to plaintiffs' memorandum contra to defendants' motion for partial summary judgment). While this unexplained inconsistency properly prompted the trial court to disregard Giffin's affidavit testimony, we conclude that even if the trial court had considered the testimony, it would not have resulted in a ruling in the Giffins' favor. As we explained above, the Giffins' ability to claim the protections of the CSPA for alleged wrongdoing during a "consumer transaction" does not turn upon how the Giffins used the SRX after the purchase. Therefore, we conclude that Giffin's affidavit testimony is irrelevant.

{¶33} Finally, the Giffins argue that the trial court erred in ignoring the affidavit of Patricia Coscia, Giffin's secretary. Coscia stated in her affidavit that, to the best of her knowledge, Giffin had not used the SRX for business purposes. The trial court never mentioned Coscia's affidavit in its decision, so we cannot determine whether the trial court

actually considered it. In such a case, we must presume regularity, i.e., that the trial court complied with Civ.R. 56(C)'s mandate to render summary judgment on the affidavits (and other specified evidence). *Tonti v. East Bank Condominiums, LLC*, 10th Dist. No. 07AP-388, 2007-Ohio-6779, ¶26 ("A general principal of appellate review is the presumption of regularity; that is, a trial court is presumed to have followed the law unless the contrary is made to appear in the record."). We thus presume that the trial court considered Coscia's affidavit, and we find no error.

{¶34} Moreover, even if we were to assume, as the Giffins do, that the trial court ignored Coscia's affidavit, we conclude that the Giffins suffered no prejudice as a result. Coscia solely testified regarding the use of the SRX after its purchase, and again, such testimony has no relevancy in this case.

{¶35} In sum, we conclude that the trial court did not err in disregarding the affidavits attached to the Giffins' memorandum contra to defendants' motion for partial summary judgment. Accordingly, we overrule the Giffins' third assignment of error.

{¶36} By the Giffins' fourth assignment of error, they argue that the trial court erred in refusing to consider certain documentary exhibits attached to Diana Giffin's memorandum contra to defendants' motion for summary judgment on the remaining claims. While the trial court erred in excluding one exhibit, we conclude that this error was harmless.

{¶37} The admission or exclusion of evidence rests within the sound discretion of the trial court. *Wrightman v. Consol. Rail Corp.*, 86 Ohio St.3d 431, 437, 1999-Ohio-119. Absent a clear showing that the trial court abused its discretion in a manner that materially prejudiced the appellant, an appellate court will not disturb a trial court's ruling

on the admissibility of evidence. *Carter v. U-Hall Internatl.*, 10th Dist. No. 09AP-310, 2009-Ohio-5358, ¶9; *Bruce v. Junghun*, 182 Ohio App.3d 341, 2009-Ohio-2151, ¶19; *Sidenstricker v. Miller Pavement Maintenance, Inc.*, 158 Ohio App.3d 356, 2004-Ohio-4653, ¶23. "The term 'abuse of discretion' connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶38} In the context of a motion for summary judgment, the moving party and, if necessary, the nonmoving party must direct the trial court's attention to evidentiary materials of the type listed in Civ.R. 56(C). *Hart v. Columbus Dispatch/Dispatch Printing Co.*, 10th Dist. No. 02AP-506, 2002-Ohio-6963, ¶17, quoting *Buzzard v. Pub. Emp. Retirement Sys. of Ohio* (2000), 139 Ohio App.3d 632, 636. Civ.R. 56(C) expressly limits the material that a court can consider to "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any \* \* \*." Civ.R. 56(C) (also stating that "[n]o evidence or stipulation may be considered except as stated in this rule"). If a party wishes to introduce a document that Civ.R. 56(C) does not list, it must incorporate that evidentiary material into an affidavit that meets the requirements of Civ.R. 56(E). *State ex rel. Anderson v. Obetz*, 10th Dist. No. 06AP-1030, 2008-Ohio-4064, ¶30; *Cook v. Wilson*, 165 Ohio App.3d 202, 2006-Ohio-234, ¶32; *Meadows v. Freedom Banc, Inc.*, 10th Dist. No. 03AP-1445, 2005-Ohio-1446, ¶21; *Knox v. Travelers Ins. Co.*, 10th Dist. No. 02AP-28, 2002-Ohio-6958, ¶12, fn. 1.

{¶39} In the case at bar, the trial court excluded six documentary exhibits because the Giffins failed to incorporate them by reference into their affidavits. Reviewing the

Giffins' affidavits, we agree with the trial court that they do not authenticate the six documentary exhibits. Because five of the documentary exhibits at issue do not constitute Civ.R. 56(C) materials, the trial court properly refused to consider them. However, the last documentary exhibit consists of defendants' answers to the Giffins' interrogatories and defendants' responses to the Giffins' requests for admission. As Civ.R. 56(C) names these materials, a party need not authenticate them via an affidavit before submitting them in support of or in opposition to a motion for summary judgment. We thus conclude that the trial court abused its discretion in failing to consider the answers to interrogatories and admissions.

{¶40} Nevertheless, the improper exclusion of the answers to interrogatories and admissions does not warrant reversal of the trial court's ruling on summary judgment unless it materially prejudiced the Giffins. The Giffins do not identify any prejudicial effect, and our review of the record does not uncover one either. Much of the evidence in the answers to interrogatories and admissions is duplicative of Graves' and Johnson's deposition testimony. Consequently, even though the trial court excluded the answers to interrogatories and admissions, it had the evidence contained in those documents before it in the form of deposition testimony. Without any indication that the exclusion of the answers to interrogatories and admissions materially prejudiced the Giffins, we conclude that the trial court's error was harmless. Accordingly, we overrule the Giffins' fourth assignment of error.

{¶41} By the Giffins' fifth assignment of error, they argue that the trial court erred in determining that the bike rack receiver was properly installed. Initially, we note that a large part of the Giffins' argument in support of this assignment of error focuses on

defendants' alleged misrepresentation that the SRX had a trailer towing package. The assigned error, however, only challenges the trial court's ruling on the bike rack receiver. Pursuant to App.R. 12(A)(1)(b), appellate courts "determine [an] appeal on its merits on the assignments of error set forth in the briefs under App.R. 16 \* \* \*." Thus, this court rules on assignments of error only, and will not address mere arguments. *In re Estate of Taris*, 10th Dist. No. 04AP-1264, 2005-Ohio-1516, ¶5. Because the Giffins have not assigned any error related to the absent trailer towing package, we will not address that issue. See *Guernsey v. Milano Sports Enterprises, L.L.C.*, 177 Ohio App.3d 314, 2008-Ohio-2420, ¶40 (refusing to address contentions in the argument section of the brief that did not fall under an assignment of error).

{¶42} In the part of the argument related to the assigned error, the Giffins point to evidence to support their claim that defendants negligently misrepresented that installation of a bike rack receiver would be included in the price of the SRX. A person is liable for negligent misrepresentation if he, " 'in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.' " *Delman v. Cleveland Heights* (1989), 41 Ohio St.3d 1, 4 (emphasis omitted) (quoting 3 Restatement (Second) of Torts (1965), Section 552(1)).

{¶43} In part, the trial court granted defendants' summary judgment on the negligent misrepresentation claim because it found that Diana Giffin failed to adduce any evidence that defendants promised her a bike rack receiver. However, Diana Giffin

testified in her deposition that Johnson agreed to "throw [the bike rack receiver] in" when the Giffins were negotiating the purchase of the SRX on May 31, 2005. Diana Giffin deposition, at 18. Although the Giffins ultimately purchased the SRX under different terms, Giffin testified that Johnson told him that he would "still throw in the bike rack [receiver]." Giffin deposition, at 15. Thus, contrary to the trial court's finding, the record contains evidence from which a reasonable finder of fact could conclude that Johnson promised the Giffins a "free" bike rack receiver.

{¶44} The trial court also found that Diana Giffin failed to present evidence that she suffered damages due to her reliance on Johnson's promise. However, Johnson testified that he calculated the price for the SRX by adding the cost of a bike rack receiver (\$205.75) to the employee selling price from the invoice (\$48,659.40). The Giffins, therefore, paid for the bike rack receiver that Johnson said he would "throw in." Consequently, the record contains evidence from which a reasonable finder of fact could conclude that the Giffins suffered pecuniary loss when they paid for the "free" bike rack receiver that Johnson promised them.

{¶45} In sum, we conclude that a reasonable finder of fact could conclude that Johnson promised to "throw in" a bike rack receiver and then charged Diana Giffin for that item. Therefore, the trial court erred in granting summary judgment to defendants on the negligent misrepresentation claim to the extent that that claim is based upon representations regarding the bike rack receiver. Accordingly, we sustain the Giffins' fifth assignment of error.

{¶46} By the Giffins' sixth assignment of error, they argue that the trial court erred in finding that defendants failed to hold the title as they promised the Giffins. Contrary to

the Giffins' assertion, the trial court did not make any findings of fact regarding the title. Rather, the trial court recognized that "a genuine issue of fact exist[ed] as to when defendants were supposed to record the title of the vehicle." R. 128-31. The trial court nevertheless granted defendants' summary judgment on the negligent misrepresentation and fraudulent inducement claims based on the alleged early reporting of the mileage because the Giffins sought the court's assistance to recover for a fraudulent scheme gone awry.

{¶47} No court will lend its aid to a party who founds his cause of action on an immoral or illegal act. *Nahas v. George* (1951), 156 Ohio St. 52, 57; *Goudy v. Gebhart* (1853), 1 Ohio St. 262, 265. " 'Wherever \* \* \* two or more persons are engaged in a fraudulent transaction to injure another, neither law nor equity will interfere, to relieve either of those persons, as against the other, from the consequences of their own misconduct.' " *Goudy* at 265 (quoting *Bolt v. Rogers* (N.Y. Ch. 1832), 3 Paige Ch. 154, 157).

{¶48} Here, the Giffins wanted to benefit from the personal use of the SRX *and* deduct the cost of the SRX as a business expense on their 2005 taxes. Unfortunately, to achieve both ends, the Giffins needed to conceal from the IRS the fact that they drove the SRX over 5,000 miles for a personal purpose. That way, the Giffins could ignore the 5,000 miles when calculating the percentage of business versus personal use of the SRX, and falsely claim that more than 80 percent of the SRX's use in 2005 was for business purposes.<sup>2</sup> Such a scheme would have perpetuated a fraud on the IRS.

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<sup>2</sup> Apparently, Giffin planned to deduct the cost of the SRX from the Giffins' taxes pursuant to 26 U.S.C. 179. That section allows a business to deduct the cost of certain property purchased during the tax year. Under 26 C.F.R. 1.179-1(d), "[i]f a taxpayer uses section 179 property for trade or business as well as other purposes, the portion of the cost of the property attributable to the trade or business use is eligible for

{¶49} When Yanni processed the paperwork for the SRX's title before the Giffins returned from vacation, the Giffins were precluded from carrying out their scheme. So, the Giffins came to the trial court for redress, seeking damages in an amount equal to the deduction they would have claimed had they been able to dupe the IRS. We conclude that, under these circumstances, the trial court properly refused to aid the Giffins. To do so would have endorsed the Giffins' fraudulent scheme and allowed the Giffins to profit as if their fraud had actually worked. Accordingly, we overrule the Giffins' sixth assignment of error.

{¶50} By the Giffins' seventh assignment of error, they argue that the trial court erred in failing to find that Graves misrepresented that Crestview would only profit \$9 from the SRX. We disagree.

{¶51} As we stated above, to prevail on a claim for negligent misrepresentation, a plaintiff must demonstrate that the defendant supplied false information. *Delman* at 4. Here, the Giffins assert that the representation that Crestview would profit \$9 is false, but the record contains no evidence supporting this assertion. Instead, the evidence establishes that the invoice price of the SRX was \$51,191 and, at the time of the representation, the price offered to the Giffins was \$51,200 (before the \$2,000 rebate). This evidence actually demonstrates the veracity of the alleged representation, not its falsity. Moreover, recovery for negligent misrepresentation requires proof that the plaintiff suffered a pecuniary loss because of her justifiable reliance upon the defendant's misrepresentation. *Id.* Here, the record is devoid of any evidence showing that Diana

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expensing under section 179 provided that more than 50 percent of the property's use in the taxable year is for trade or business purposes." Giffin, however, testified that he could not claim a section 179 deduction unless over 80 percent of the SRX's use was for business purposes. Consequently, we will use that figure in our analysis.

Giffin incurred any monetary damages as a result of the alleged representation that Crestview would only receive a \$9 profit.

{¶52} For the foregoing two reasons, we conclude that the trial court properly granted defendants' summary judgment on the negligent misrepresentation claim to the extent that that claim is based on the representation of a \$9 profit. Accordingly, we overrule the Giffins' seventh assignment of error.

{¶53} By the Giffins' eighth assignment of error, they argue that the trial court erred in modifying the terms of the sales contract for the SRX, failing to enforce the terms of the sales contract, and finding their motion for declaratory judgment moot. We disagree.

{¶54} Essentially, the Giffins argue under this assignment of error that the May 31, 2005 document is a contract, and the trial court erred by not enforcing the terms of that contract. However, the Giffins did not assert any contractual claims, so the trial court never addressed whether the May 31, 2005 document constituted a contract or whether Crestview breached the alleged contract. Without a ruling for us to review, we cannot find error.

{¶55} Moreover, the trial court found the Giffins' motion for declaratory judgment moot because it sought a declaration that defendants had violated the CSPA, and the trial court had just granted summary judgment to defendants on the CSPA claims. We find no error in this ruling. Accordingly, we overrule the Giffins' eighth assignment of error.

{¶56} As a final matter, we address the Giffins' first assignment of error, by which they argue that the trial court erred in concluding that Giffin was not a real party in interest. We disagree.

{¶57} Civ.R. 17(A) requires that every action be prosecuted in the name of the real party in interest. A "real party in interest" must have "a real interest in the subject matter of the litigation, and not merely an interest in the action itself, *i.e.*, one who is *directly* benefited or injured by the outcome of the case." *Shealy v. Campbell* (1985), 20 Ohio St.3d 23, 24 (emphasis sic). If party to an action is not a real party in interest, that party lacks standing to pursue the action. *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, 77, 1998-Ohio-275; *Brown v. Columbus City Schools Bd. of Ed.*, 10th Dist. No. 08AP-1067, 2009-Ohio-3230, ¶6. To have standing, a party must demonstrate an injury in fact, which requires a showing that the party has suffered or will suffer a specific injury as a result of the challenged action and that the court can redress such injury. *Brown* at ¶6; *Camp St. Mary's Assn. of the West Ohio Conference of the United Methodist Church, Inc., v. Otterbein Homes* 176 Ohio App.3d 54, 2008-Ohio-1490, ¶13; *Eng. Technicians Assn. v. Ohio Dept. of Transp.* (1991), 72 Ohio App.3d 106, 110.

{¶58} As we held above, the only claim to survive defendants' motion for summary judgment is the claim for negligent misrepresentation based upon Johnson's statement that the SRX's price would include a bike rack receiver. Consequently, we must determine whether Giffin suffered a direct injury as a result of that alleged negligent misrepresentation.

{¶59} A party injured by a negligent misrepresentation is entitled to recover those damages necessary to compensate that party for the pecuniary loss caused by the misrepresentation. *Atco Med. Prod., Inc. v. Stringer* (Apr. 8, 1998), 9th Dist. No. 18571. Here, the evidence adduced thus far establishes that the pecuniary loss was \$205.75—the cost of the bike rack receiver. We agree with the trial court that only Diana Giffin, as

the sole purchaser and owner of the SRX, directly suffered that loss. Because Giffin is Diana Giffin's husband and an additional driver of the SRX, he has an interest in the outcome of the action, but he has not suffered a specific injury. See *Hampton v. Dieter* (Feb. 24, 1994), 8th Dist. No. 64601 (holding that the plaintiff's wife was not a real party in interest because she was not an owner of the house that the plaintiff claimed the defendants had fraudulently induced him to purchase). Accordingly, we conclude that Giffin is not a real party in interest, and we overrule the Giffins' first assignment of error.

{¶60} For the foregoing reasons, we overrule the Giffins' first, second, third, fourth, sixth, seventh, and eighth assignments of error, and we sustain the Giffins' fifth assignment of error. Consequently, we affirm in part and reverse in part the judgment of the Franklin County Court of Common Pleas, and we remand this action to that court for further proceedings consistent with law and this opinion.

*Judgment affirmed in part and reversed in part,  
and cause remanded.*

FRENCH, P.J., and SADLER, J., concur.

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