[Cite as *Swoger v. Hogue*, 2015-Ohio-506.]

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

WILLIAM SWOGER, ET AL.	:	JUDGES:
	:	
	:	Hon. W. Scott Gwin, P.J.
Plaintiffs - Appellants	:	Hon. Sheila G. Farmer, J.
	:	Hon. Craig R. Baldwin, J.
	:	
-vs-	:	
	:	
RICK HOGUE, ET AL.	:	Case No. 2013 AP 011 0045
	:	
	:	
Defendants - Appellees	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Tuscarawas County Court of Common Pleas, Case No. 2011 CV 06 0690
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	February 9, 2015

APPEARANCES:

For Plaintiffs-Appellants

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Baldwin, J.

{¶1} Appellants William and Tracy Swoger appeal a judgment of the Tuscarawas County Common Pleas Court awarding them damages in the amount of $62,298.82 on their complaint for breach of contract, violation of the Consumer Sales Practices Act (CSPA), and negligence against appellee Rick Hogue Construction, Inc.; entering judgment in favor of appellee Rick Hogue Construction, Inc. on appellants' claim for breach of implied warranty; and entering judgment in favor of appellee Rick Hogue on appellants' complaint for violation of the CSPA.

STATEMENT OF FACTS AND CASE

{¶2} Appellants purchased a ten-acre lot in 2006 in New Philadelphia, Ohio, intending to construct a large, custom-built luxury home. They met with Rick Hogue, owner of Rick Hogue Construction, Inc., several times regarding the potential construction. However, due to the illness of their son, the Swogers put their building plans on hold.

{¶3} Appellants contacted Hogue again in 2008 and engaged in planning meetings. Appellants had purchased blueprints over the internet from a company in Georgia. Appellants hired Rick Hogue Construction, Inc. as the general contractor. Before the parties entered into a formal contract, Hogue shot grades to determine the best location for the home, taking into consideration water flow. Hogue discussed the possibility of moving the location of the home, but appellants chose not to change the location.

{¶4} On February 2, 2009, the parties entered into a "time and material contract" for construction of the home. The contract provided that appellants would pay the actual cost of materials, would pay labor costs at the rate of $25.00 per hour, and would pay the general contractor 10% of the total cost. The estimated cost of the project was $800,000.00, and the contract specifically stated that the estimated cost was subject to change based on the actual cost of labor and materials and the final scope and nature of the project. Appellants obtained a

construction loan in the amount of $1,012,865.00, which closed in June of 2009. The final cost of the home was $1,043,000.00.

{¶5} Appellants moved into the completed home in November, 2010. In the spring of 2011, appellants noticed water problems in the basement of the home. They further identified problems with the stone veneer and with the chimney. Appellants filed the instant action alleging that Rick Hogue Construction was negligent in the construction of the home and breached an implied warranty. They further alleged that both Rick Hogue and Rick Hogue Construction, Inc. violated the Consumer Sales Practices Act.[1] Appellants also alleged that appellees breached the contract by failing to document all time and materials used on the construction of the house and by charging a 12% markup instead of the 10% markup stated in the contract.

{¶6} The trial court granted partial summary judgment on appellants' claim that Rick Hogue Construction breached the contract by charging a 12% markup. The remaining claims proceeded to jury trial in the Tuscarawas County Common Pleas Court. Appellants presented evidence that in addition to the physical problems with the construction of the home, appellees failed to provide them with a monthly breakdown of material and labor costs. Appellants argued that $314,714.79 of costs on the home remained undocumented.

{¶7} Rick Hogue testified that on a project costing more than $500,000.00, his percentage as general contractor is 12% rather than 10%. He testified that appellants were aware of this and had agreed to pay 12%, but his office worker printed out the incorrect contract, and he was unaware of the mistake. He testified that he provided appellants with monthly bills showing time and materials costs, although he did not always have the receipts from the subcontractors and did not break down the hours worked by individual subcontractor. Appellees presented evidence that the cost overrun from the original budget was a result of an

[1] Appellees filed a third-party complaint against numerous subcontractors involved in the construction of the home. The jury found in favor of all third-party defendants, and none of the third-party defendants are parties to this appeal.

increase of the size of the home from approximately 3,750 square feet to approximately 6,600 square feet, and due to Tracy Swoger ordering higher-priced items such as plumbing fixtures and woodwork than originally budgeted.

{¶8} The jury found in favor of appellants on their breach of contract claim against appellee Rick Hogue Construction, Inc. awarding damages in the amount of $47,298.82. The jury found in favor of appellants against Rick Hogue Construction, Inc. on the CSPA claim, awarding damages in the amount of $5,000.00. The jury found in favor of Rick Hogue personally on the CSPA claim. The jury found in favor of Rick Hogue, Construction, Inc. on the breach of implied warranty claim. The jury found in favor of appellants on their negligence claim, but awarded damages of $0.00.

{¶9} In response to interrogatories, the jury awarded appellants damages in the amount of $19,586.22 on the partial summary judgment concerning the contract markup percentage. The jury found that Rick Hogue Construction, Inc. was liable to appellants for damages of $27,712.60 for another unspecified breach of contract. The jury found that Rick Hogue Construction had committed one or more of twelve unfair, deceptive or unconscionable acts or practices in violation of the CSPA; however, the interrogatories did not ask which of the twelve acts the jury found the company had committed. The jury found that Rick Hogue Construction did not knowingly commit one or more of these unfair or deceptive acts, and found that Rick Hogue did not personally take part in the commission of the unfair or deceptive acts, nor did he specifically direct those acts to be performed.

{¶10} The court entered judgment in accordance with the jury's verdict.

{¶11} Appellants assign three errors:

{¶12} "I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT PREVENTED APPELLANTS FROM INTRODUCING EVIDENCE OF APPELLEE RICK HOGUE'S PRIOR CONSUMER SALES PRACTICES ACT VIOLATION.

{¶13} "II. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT INSTRUCTED THE JURY ON THE AFFIRMATIVE DEFENSE OF PREVENTION OF PERFORMANCE.

{¶14} "III. THE JURY'S VERDICT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

I.

{¶15} In their first assignment of error, appellants argue that the court abused its discretion in excluding evidence that appellee was found to have committed CSPA violations in a 2003 arbitration proceeding, which appellants intended to offer to prove that appellee knowingly violated the CSPA.

{¶16} The admission or exclusion of relevant evidence rests within the sound discretion of the trial court. *State v. Sage*, 31 Ohio St.3d 173, 180, 510 N.E.2d 353, 358 (1987). "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore,* 5 Ohio St. 3d 217, 219, 450 N.E.2d 1140, 1142 (1983).

{¶17} Appellants sought to admit evidence that appellees were found to have committed CSPA violations in an arbitration proceeding, and that this Court affirmed such findings in *Hogue v. Sadler*, 5th Dist. Coshocton No. 03CA013, 2004-Ohio-6132. The arbitration panel found that Hogue overbilled the Sadlers on two occasions in the amount of $20,000.00, knowing he had not yet earned the sum billed, and also overbilled for bonuses or advances paid to employees in the amount of $3,000.00. The panel found that the overbilled amount was taken into account in the total payments made by the Sadlers, and thus the Sadlers were only denied the interest on the money at the rate of 10% per annum for the period detained by Hogue. The panel found Hogue to be indebted to the Sadlers in the amount of $2,316.46. The panel also awarded Hogue damages on his claim against the Sadlers. This

Court affirmed based solely on the failure of either party to provide a transcript of the arbitration proceedings. *Id*. at ¶15-16.

{¶18} The trial court set forth its reasoning for excluding the evidence of the 2003 arbitration finding when appellants first attempted to question Rick Hogue regarding the prior violation:

{¶19} "I read through the – considered the arguments, read through the elements of the CSPA claim, specifically noted that knowledge, in-intent is not necessary then it's knowingly committed the act but not necessarily that the Defendant knew the act violated the law as far as the elements and also noted that this is a case that's ten years old. The dispute is different. The – both parties had claims and the – I was also looking at Evidence Rules on offering information to prove conforming conduct and also the prejudicial effect. So, with all of those things, I put a lot of thought into it, I am granting the mot-the objection." Tr. Vol. II, p 148.

{¶20} Later in the trial when appellants asked the court to reconsider its ruling, the trial court stated:

> Okay. And when I mentioned that it was 2003, it was again, in an attempt to make a record so that we're clear that the arbitration ruling was from 2003, not that there's any significance to the ten years that have passed or whether it was, you know, six or five or three, but I read the decision, I saw that it was brought by-by Mr. Hogue, that there were apparently issues on both sides. I read the decision and found – and I noticed that the finding was that on, there were two-two instances, one month where there was a Two Thousand dollar discrepancy. One month where there was a One Thousand dollar discrepancy, and then there were also issues on both sides that ended in a net result in favor of Mr. Hogue.

> And I think, again, Rule 404 talks about the evidence of other wrongs or acts is not admissible to prove the character of the person in order to show he acted in conformity therewith, and I know that you're seeking to find that exception under absence of mistake or accident. The 608 also talks about not being able to attack someone's character by extrinsic evidence unless it's clearly probative of truthfulness or untruthfulness, that there might be some-some exceptions there.
>
> I am gonna stand by my ruling. I think that we need to be talking about what is-what the claims are here and I-I think that it would be unduly prejudicial to start talking about a case where there was a Three Thousand dollar discrepancy ten years ago when we have plenty to talk about here. So I'm-I'm gonna stand by the original ruling. And I guess the same would apply to the-the specter of fraudulent or untruthful activity with respect to the sale of the house. I understand that's another very passionate issue. It's something that the defense finds offensive. If it's true, many people might find it offensive. It's going to create prejudice here. I think we need to just be talking about these issues. What happened here? What are the facts here? And-and so that's why I'm standing by both these rulings.[2] Tr. Vol. VI, p. 1007-1008.

{¶21} Appellants argue that evidence of the 2003 arbitration was admissible pursuant to Evid. R. 404(B):

[2] Appellees had asked the court to reconsider her ruling excluding evidence of appellants' alleged fraudulent conduct in the sale of their previous home, and the trial court simultaneously declined to reconsider both prior evidentiary rulings.

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. In criminal cases, the proponent of evidence to be offered under this rule shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

{¶22} Appellants also argue the evidence was admissible pursuant to Evid. R. 608(B):

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's character for truthfulness, other than conviction of crime as provided in Evid. R. 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if clearly probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness's character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

{¶23} Appellants rely on *Kimble Mixer Co. v. St. Vincent*, 5th Dist. Tuscarawas No. 2005 P 09 0068, 2006-Ohio-2258, in support of their argument. In *Kimble Mixer*, the challenged evidence of past violations was admitted at trial, and therefore this Court reviewed the court's *admission* of evidence under an abuse of discretion standard, rather than the *exclusion* of evidence as in the instant case.

{¶24} It appears from the trial court's language concerning unfair prejudice and focusing solely on evidence related to the transaction at issue that the court excluded the evidence pursuant to Evid. R. 403(B), which states:

{¶25} "Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence."

{¶26} The trial court did not abuse its discretion in excluding evidence of the Sadler arbitration. The panel's decision provides only a cursory discussion of the facts underlying the CSPA violation, and as noted by this Court on appeal, no record of the arbitration proceeding was transmitted to the court. Therefore, we cannot determine from the record that the issues involved in the case were so similar as to demonstrate absence of mistake in the instant case. Both parties sought to admit character evidence, and the trial court ultimately concluded that allowing a "mini-trial" concerning Hogue's past CSPA violation finding and allegations of fraud in appellants' sale of their home would confuse the jury, be unduly prejudicial to the parties, cause undue delay, and focus the attention away from the issues in the instant case.

{¶27} The first assignment of error is overruled.

II.

{¶28} In their second assignment of error, appellants argue that the court erred in instructing the jury concerning the defense of prevention of performance, as there was no evidence that they prevented appellees from performing pursuant to the terms of the contract.

{¶29} The Ohio Supreme Court has recently stressed that in order to require reversal, an erroneous jury instruction must result in substantial prejudice to the complaining party:

> In ascertaining whether prejudicial error exists, the court is "bound by the disclosures of the record." *Makranczy v. Gelfand,*

109 Ohio St. 325, 329, 142 N.E. 688 (1924). To find that substantial justice has not been done, a court must find (1) errors and (2) that without those errors, the jury probably would not have arrived at the same verdict. *Hallworth v. Republic Steel Corp.,* 153 Ohio St. 349, 91 N.E.2d 690 (1950), paragraph three of the syllabus. Even an erroneous jury instruction "'may not be sufficiently prejudicial to justify a reversal.'" *Hampel v. Food Ingredients Specialties, Inc*., 89 Ohio St.3d 169, 186, 729 N.E.2d 726 (2000), quoting *Smith v. Flesher,* 12 Ohio St.2d 107, 114, 233 N.E.2d 137 (1967). To conclude that a party's substantial rights were materially affected, an appellate court must find that the jury charge was so misleading and prejudicial as to result in an erroneous verdict. *Cleveland Elec. Illum. Co. v. Astorhurst Land Co*., 18 Ohio St.3d 268, 274, 480 N.E.2d 794 (1985). Making such a determination requires a "thorough review of the entire transcript of proceedings before the trial court." *Hampel* at 186, 729 N.E.2d 726.

A jury instruction must be considered in its entirety and, ordinarily, reversible error does not consist of misstatements or ambiguity in a part of the instruction.' *Sech v. Rogers,* 6 Ohio St.3d 462, 464, 453 N.E.2d 705 (1983). "[W]e will not assume the presence of prejudice * * * but must find prejudice on the face of the record." *Wagner v. Roche Laboratories,* 85 Ohio St.3d 457, 462, 709 N.E.2d 162 (1999). In addition, an appellate court must determine not only whether there was prejudice, but also "the degree of prejudice." *Id*. at 461, 709 N.E.2d 162. The *244 jury

> instruction given in error must be "so prejudicial * * * that a new trial is warranted. *Id*.

{¶30} *Hayward v. Summa Health Sys./Akron City Hosp.,* 139 Ohio St.3d 238, 243-44, 2014-Ohio-1913, ¶¶ 25-26 (2014).

{¶31} The trial court instructed the jury as follows regarding the defense of prevention of performance:

> Rick Hogue Construction, Inc. claims that it is excused from its failure to perform under the Contract because the Plaintiffs prevented it from completing its Contract. If all the requirements of prevention of performance are proved, then the Defendant is excused from performing the contract. 'Prevention of performance' occurs when the Plaintiffs prevented the Defendant from completing its work, and the Defendant would have completed the Contract but for the Plaintiffs' actions. Tr. Vol. X, p. 1631-1632.

{¶32} Rick Hogue testified that he submitted a remediation proposal to appellants, and they failed to respond to his request, instead filing the instant suit and hiring outside contractors to fix the problems with the house. Therefore, there was some evidence presented that appellants prevented Hogue from addressing their concerns with the house and complying with the contract. Further, the jury found for appellants on the breach of contract action and awarded damages. Therefore, we cannot find substantial prejudice to appellants from the jury instruction concerning prevention of performance.

{¶33} The second assignment of error is overruled.

III.

{¶34} Appellants argue that the verdict on their claim for violation of the CSPA is against the manifest weight of the evidence.

{¶35} A judgment supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Construction Co.*, 54 Ohio St. 2d 279, 376 N.E.2d 578 (1978). As the trier of fact, the judge is in the best position to view the witnesses and their demeanor in making a determination of the credibility of the testimony. "[A]n appellate court may not simply substitute its judgment for that of the trial court so long as there is some competent, credible evidence to support the lower court's findings." *State ex rel. Celebrezze v. Environmental Enterprises, Inc.*, 53 Ohio St.3d 147, 154, 559 N.E.2d 1335 (1990).

{¶36} The Ohio Consumer Sales Practices Act ("CSPA"), which is codified in R.C. Chapter 1345, prohibits unfair or deceptive acts and unconscionable acts or practices by suppliers in consumer transactions. The act is intended to be remedial and should be construed liberally in favor of consumers. *Einhorn v. Ford Motor Co.*, 48 Ohio St.3d 27, 29, 548 N.E.2d 933 (1990).

{¶37} Whereas R.C. 1345.02 prohibits unfair or deceptive acts or practices, R.C. 1345.03 prohibits unconscionable acts or practices in connection with consumer transactions, whether such acts or practices occur before, during, or after a transaction. This section lists a number of circumstances to be taken into consideration in determining whether an act or practice is unconscionable. In order to recover for unconscionable acts or practices, the consumer must prove that the supplier acted unconscionably and knowingly. *Karst v. Goldberg*, 88 Ohio App.3d 413, 418, 623 N.E.2d 1348 (1993).

{¶38} In order to establish a CSPA violation, the court must determine that the transaction between the parties was one to which the CSPA applied. A "consumer transaction"

is defined as any "sale, lease, assignment, award by chance, or other transfer of an item of goods * * * to an individual for purposes that are primarily personal, family, or household[.]" R.C. 1345.01(A). However, this statute must be read in conjunction with R.C. 1345.02 and R.C. 1345.03, which provide that a supplier is prohibited from doing certain things "in connection with a consumer transaction." The consumer need not prove the supplier intended to commit an unfair or deceptive act to establish a violation of the CSPA, but need only prove such an act was committed. *Garner v. Borcherding Buick, Inc.*, 84 Ohio App.3d 61, 64, 616 N.E.2d 283 (1992).

{¶39} To determine if a specific act or practice is a deceptive sales practice which violates the general directive of R.C. 1345.02(A), one must look to three separate sources. First, R.C. 1345.02(B) contains an enumerated list of practices that are unfair or deceptive. Second, pursuant to R.C. 1345.05(B)(2), the attorney general is authorized to adopt substantive rules defining acts or practices that violate R.C. 1345.02. These rules are found in the Ohio Administrative Code. Third, Ohio courts have defined a variety of specific acts and practices which are unfair or deceptive. *Frey v. Vin Devers, Inc.*, 80 Ohio App.3d 1, 6, 608 N.E.2d 796 (1992). See, also, *Fletcher v. Don Foss of Cleveland, Inc.*, 90 Ohio App.3d 82, 86, 628 N.E.2d 60 (1993).

{¶40} In the instant case, the jury was given an interrogatory which enumerated twelve possible violations of the CSPA, and they were asked only if Rick Hogue Construction had committed any of the twelve acts; the interrogatories did not require the jury to specify which act or acts they found to be demonstrated by the greater weight of the evidence. The possible unfair, deceptive or unconscionable acts or practices set forth in Interrogatory No. 4 were:

{¶41} "(1) failed to provide the Swogers with an itemized list of services rendered, including a list of parts or materials and the cost thereof, the amount charged for labor, and the identity of the individual performing the particular service;

{¶42} "(2) knowingly breached the contract with the Swogers without a legal defense to do so;

{¶43} "(3) materially understated or misstated the estimated cost of the service;

{¶44} "(4) represented that a specific price advantage exists if it did not;

{¶45} "(5) charged for any service that had not been authorized by the consumer;

{¶46} "(6) made misleading statements or statements of opinion to the consumer at the time they signed the contract, which the contractor knew that the consumer would rely upon to their detriment;

{¶47} "(7) failed to include all material statements in the contract document;

{¶48} "(8) failed to perform in a competent and workmanlike manner;

{¶49} "(9) represented that the subject of the transaction is of a particular standard, quality, grade, or style, if it was not;

{¶50} "(10) failed, at the time of the signing or initialing of any document by a consumer, to provide the consumer with a copy of the document;

{¶51} "(11) represented that the transaction involves a warranty if the representation is false; and/or

{¶52} "(12) represented that services have been performed when those services have not been performed."

{¶53} Appellants argue that the jury's finding that Rick Hogue was not personally liable for violation of the CSPA is against the manifest weight of the evidence. They argue that because Rick Hogue Construction, Inc. is essentially a one-man operation, any acts committed by the corporation were committed by Rick Hogue personally.

{¶54} A corporate officer may be held individually liable for acts that violate the CSPA. *Grayson v. Cadillac Builders, Inc.*,8th Dist. Cuyahoga No. 68551, 1995 WL 546916, at 3 (Sept. 14, 1995). In order to hold a corporate officer personally liable for his actions in violation of the

CSPA, the evidence must show that the officer participated in the commission of an act or specifically directed the particular act to be done. *Id.* In *Grayson,* the court clarified:

> The [CSPA] does not change the existing common law of tort, nor does it change the common law rule with respect to piercing the corporate veil. A corporate officer may not be held liable merely by virtue of his status as a corporate officer. It does, however, create a tort which imposes personal liability upon corporate officers for violations of the act performed by them in their corporate capacities. *Id.* at fn. 1.

{¶55} The jury specifically found in interrogatory number eight that Rick Hogue did not take part in the commission of the unfair or deceptive acts, nor did he specifically direct those acts to be performed. As noted above, Interrogatory No. 4 listed twelve acts which the jury could find to be a violation of the CSPA, stated in the disjunctive: the jury could find any one or any combination of them proven by the evidence in order to find a violation of the CSPA. Further, the interrogatories did not ask the jury to specify what act or acts they found to violate the CSPA.

{¶56} Although the majority of the actions which appellants claimed violated the CSPA were committed by Rick Hogue personally acting on behalf of the company, Hogue testified that the contract which stated the markup percentage to be 10% rather than the 12% he charged was prepared by a woman who prepares contracts in his office. He testified that on a contract of a value greater than $500,000.00, he normally charged 12%, and that he orally negotiated a 12% markup with appellants. He testified that he did not notice that difference in the percentage prior to signing the contract, and he charged the 12% throughout the construction process unaware that the contract read 10%. From reading the two interrogatories together, it appears that the jury found the only violation of the CSPA in the instant case to be the difference

between the contract markup of 10% and the charged markup of 12%, and they concluded from the evidence that the error that constituted the violation of the CSPA was made by the person who typed the contract and not by Rick Hogue personally. The jury's finding that Rick Hogue was not personally liable is not against the manifest weight of the evidence.

{¶57} Appellants next argue that the jury's finding that Rick Hogue Construction, Inc. did not act "knowingly" is against the manifest weight of the evidence.

{¶58} The CSPA allows the trial court to award reasonable attorney fees if "[t]he supplier has knowingly committed the act or practice that violates this chapter." R.C. 1345.09(F)(2). "Knowledge" is defined as "actual awareness, but such actual awareness may be inferred where objective manifestations indicate that the individual involved acted with such awareness." R.C. 1345.01(E).

{¶59} "Knowingly" committing an act in violation of R.C. Chapter 1345 means that the supplier need only intentionally do the act that violates the CSPA; the supplier does not have to know that his conduct violates the law for the court to grant attorney fees. *Einhorn v. Ford Motor Co*., 48 Ohio St. 3d 27, 30, 548 N.E. 2d 933, 936 (1990).

{¶60} As previously discussed, it appears from the jury's interrogatories that although they were not asked to specify what actions they found to be in violation of the CSPA, they found that the only action that violated the CSPA was the markup differential between the contract and what was charged. There was evidence presented through Rick Hogue's testimony that he did not intentionally charge an amount different than what was in the contract. He testified that he always charged 12% on a project of this magnitude and that he had discussed the 12% markup with appellants prior to entering into the contract. He testified that he failed to notice that the written contract markup was 10% rather than 12%. From this evidence, the jury could conclude that Rick Hogue Construction, Inc. did not intentionally commit the act that violates the CSPA and thus did not act knowingly.

{¶61} Finally, appellants argue that $5,000.00 in damages is inadequate to compensate them for appellee's violation of the CSPA. They argue that they are entitled to damages for undocumented materials and labor costs.

{¶62} Appellants' argument is premised on an assumption that the jury's finding of violation of the CSPA necessarily encompassed a finding that appellee Rick Hogue Construction, Inc. failed to properly document materials and labor costs. However, the jury appears to have only found appellee to have violated the CSPA with respect to the markup charge. The jury apparently believed Rick Hogue's evidence that he provided appellants with breakdowns of labor and material costs on a monthly basis, as well as appellees' evidence concerning all other alleged violations of the CSPA. Therefore, the damage award is not inadequate if it compensates appellants for the error in the contract markup.

{¶63} R.C. 1345.09(A) provides:

{¶64} "For a violation of Chapter 1345. of the Revised Code, a consumer has a cause of action and is entitled to relief as follows:

{¶65} "(A) Where the violation was an act prohibited by section 1345.02, 1345.03, or 1345.031 of the Revised Code, the consumer may, in an individual action, rescind the transaction or recover the consumer's actual economic damages plus an amount not exceeding five thousand dollars in noneconomic damages."

{¶66} Having awarded appellants their economic damages upon the trial court's grant of partial summary judgment on the issue of the contract markup percentage, it appears the jury further awarded appellants' noneconomic damages of $5,000.00, the maximum amount allowed by statute. The amount of damages is not against the manifest weight of the evidence.

{¶67} The third assignment of error is overruled. The judgment of the Tuscarawas County Common Pleas Court is affirmed. Costs are assessed to appellants.

By: Baldwin, J.

Gwin, P.J. and

Farmer, J. concur.