[Cite as *Fink v. Daimler Chrysler Motors Corp.*, 2004-Ohio-5125.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

ROBERT FINK, PLAINTIFF-APPELLANT, - VS - DAIMLERCHRYSLER CORPORATION, ET AL., DEFENDANTS-APPELLEES.	)	CASE NO. 03-MA-155 OPINION

CHARACTER OF PROCEEDINGS:	Civil Appeal from Common Pleas Court Case No. 01 CV 2190
JUDGMENT:	Affirmed
APPEARANCES:	
For Plaintiff-Appellant:	Attorney Ralph A. Zuzolo, Jr. ZUZOLO, ZUZOLO & ZUZOLO 700 Youngstown Warren Road Niles, Ohio 44446
For Defendants-Appellees:	Attorney Todd A. Gray SUTTER, O'CONNELL, MANNION & FARCHIONE CO. L.P.A. 3600 Erieview Tower 1301 E. 9th Street Cleveland, Ohio 44114

JUDGES:

Hon. Gene Donofrio
Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite

Dated: September 23, 2004

DONOFRIO, J.

{¶1} Plaintiff-appellant, Robert Fink, appeals a decision of the Mahoning County Common Pleas Court awarding summary judgment in favor of defendants-appellees, DaimlerChrysler Corporation and Frederick Motors, Inc., on his claim that appellees violated Ohio's Consumer Sales Practices Act.

{¶2} On October 5, 1999, appellant purchased a truck from Frederick Motors. After the purchase, appellant became concerned that the truck had not been equipped with a shield that would reduce road water splashed into the engine compartment which could lead to an increased potential for corrosion. Appellant alleges that he contacted Frederick Motors about installing an aftermarket splashguard in order to allay his concerns. Appellant alleges that Frederick Motors ignored his concerns and told him that if he attempted to install a shield himself he would void the truck's warranty. Appellant alleges that he also received no response from DaimlerChrysler.

{¶3} After the warranty expired, DaimlerChrysler had the vehicle inspected and allowed appellant to install a shield. The inspection revealed some oxidation on the untreated metal surfaces of the engine compartment such as the exhaust manifold, transmission cooler lines, and fuel rails.

{¶4} On August 17, 2002, appellant filed suit against appellees setting forth four causes of action: (1) violation of Ohio's Consumer Sales Practices Act; (2) breach of contract; (3) breach of implied covenant of good faith; and (4) breach of warranty. On May 5, 2003, appellees filed a motion for summary judgment. On July 11, 2003, appellant filed a motion in opposition to which appellees responded on July 22, 2003. On July 31, 2003, the trial court granted appellees' motion. This appeal followed.

{¶5} Appellant's sole assignment of error states:

{¶6} "Whether the trial court erred in failing to consider Defendant's refusal to respond to Plaintiff's complaint, a genuine issue of fact under Ohio Consumer Sales Practices Act Revised Code.1345.et seq."

{¶7} An appellate court reviews a trial court's decision on a motion for summary judgment de novo. *Bonacorsi v. Wheeling & Lake Erie Ry. Co.*, 95 Ohio St.3d 314, 2002-Ohio-2220, 767 N.E.2d 707, at ¶24. Summary judgment is properly granted when: (1) there is no genuine issue as to any 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. *Harless v. Willis Day Warehousing Co.* (1976), 54 Ohio St.2d 64, 66, 8 O.O.3d 73, 375 N.E.2d 46; Civ.R. 56(C).

{¶8} "[A] party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, 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 the essential element(s) of the nonmoving party's claims. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case. Rather, the moving party must be able to specifically point to some *evidence* of the type listed in Civ.R. 56(C) which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. * * *" (Emphasis sic.) *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264.

{¶9} The "portions of the record" or evidentiary materials listed in Civ.R. 56(C) include the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact that have been filed in the case. The court is obligated to view all the evidentiary material in a light most favorable to the nonmoving party. *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 4 O.O.3d 466, 364 N.E.2d 267.

{¶10} "If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. However, if the moving party has satisfied its initial burden, the nonmoving party then 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 nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party." *Dresher*, 75 Ohio St.3d at 293, 662 N.E.2d 264.

{¶11} Summary judgment is appropriate when there is no genuine issue as to any material fact. A "material fact" depends on the substantive law of the claim being litigated. *Hoyt, Inc. v. Gordon & Assoc., Inc.* (1995), 104 Ohio App.3d 598, 603, 662 N.E.2d 1088, citing *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 247-248, 106 S.Ct. 2505, 91 L.Ed.2d 202.

{¶12} The Ohio Consumer Sales Practices Act, set forth in R.C. Chapter 1345, is "a remedial law which is designed to compensate for traditional consumer remedies and so must be liberally construed pursuant to R.C. 1.11." *Einhorn v. Ford Motor Co.* (1990), 48 Ohio St.3d 27, 29, 548 N.E.2d 933. R.C. 1345.02 prohibits suppliers from committing unfair or deceptive acts or practices in connection with consumer transactions. R.C. 1345.03 prevents a supplier from committing unconscionable acts or practices in connection with consumer transactions and lists circumstances to be considered in determining whether the supplier knowingly took unfair advantage of the consumer.

{¶13} Initially, it should be noted that appellant's argument on appeal is directed only towards his claim that appellees violated Ohio's Consumer Sales Practices Act. He does not address the other claims of breach of contract, breach of implied covenant of good faith, and breach of warranty. The crux of appellant's argument is that appellees did not respond fairly and reasonably to his complaints and concerns.

{¶14} In support of his argument, appellant cites *Brown v. Lyons* (1974), 43 Ohio Misc. 14, 72 O.O.2d 216, 332 N.E.2d 380, for the proposition that courts have

found violations of the Consumer Sales Practices Act when the supplier has engaged in a pattern of inefficiency, incompetency, and continual stalls, which expressly includes failing to return a consumer's telephone calls. Appellant's reliance on *Brown* ignores other additional factors that the court took into consideration in reaching the conclusion that the supplier had violated the act in *Brown*. The court also found that the supplier had: sold defective merchandise; failed to honor warranties; concealed his real identity from consumers with whom he had dealt by using several fictitious names or aliases; frequently changed the names under which he did business; frequently changed the geographic location from which he did business; and failed to answer his business phones for unreasonable lengths of time.

{¶15} Without much elaboration or explanation, appellant also cites *Daniels v. True* (1988), 47 Ohio Misc.2d 8, 547 N.E.2d 425, and *Layne v. McGowen* (May 24, 1995), 2d Dist. No. 14676. These cases too are distinguishable from this case. In both *Daniels* and *Layne*, both consumer plaintiffs never received services for which they had paid the supplier defendants. The defendants failed to issue refunds and used fictitious names and/or purported to be a corporation when in fact they were not. Additionally, the defendants failed to return customers' phone calls.

{¶16} The cases cited by appellant are patently different from this case. The cases cited by appellant each involved a pattern of inefficiency, incompetency, and continual stalls. In those cases, the defendants accepted payment for services or goods specifically contracted for and then took evasive action or failed to complete the contract without issuing a refund.

{¶17} Appellant argues that an issue of fact exists concerning whether appellees made assertions about installation of the splashguard after the vehicle was purchased and appellee's lack of response to his concerns surrounding the lack of a splashguard. Appellant attempted to support his allegations in his motion in opposition to summary judgment with his deposition testimony. Appellant testified that he went to Frederick Motors and asked to have a splashguard installed but was told that he could not because it would void the warranty. He also tried to resolve the

matter with management and the owner, in person and by phone, but received no response. Additionally, he testified that he called and corresponded with DaimlerChrysler, and was unable to resolve the issue.

{¶18} As appellees correctly point out, the focus of appellant's argument sidesteps the more important issue of causation. In October 1999 when appellant purchased the truck, he was aware that it was not designed for snowplowing. In support of their motion for summary judgment, appellees highlighted appellant's own admission in this regard and attached as an exhibit the signed purchase order for the truck containing language that specifically stated, "This Vehicle Not Suitable For Snow Plowing." Despite this information, appellant testified that he plowed snow from his own driveway, a neighbor's driveway, and a drive thru beverage store he owns. He also plowed the streets of a subdivision he created. Essentially, appellant assumed the risk of causing possible corrosion/oxidation of the engine when he purchased the vehicle and then used it a manner inconsistent with its design.

{¶19} Additionally, appellees initially did not fail to respond to appellant's concerns, he was just dissatisfied with the content of that response. When appellant went to appellees four months after he purchased the truck with his concerns, they informed him that it was not designed for that purpose and that installation of the splashguard would void the warranty.

{¶20} Accordingly, appellant's sole assignment of error is without merit.

{¶21} The judgment of the trial court is hereby affirmed.

Vukovich, J., concurs.
Waite, P.J., concurs.