

[Cite as *White v. Allstate Ins. Co.*, 2009-Ohio-5829.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 92648**

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**LUSHION WHITE, ET AL.**

PLAINTIFFS-APPELLANTS

vs.

**ALLSTATE INSURANCE COMPANY, ET AL.**

DEFENDANTS-APPELLEES

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**JUDGMENT:**  
**AFFIRMED**

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CV-506043

**BEFORE:** Cooney, A.J., Kilbane, J., and Jones, J.

**RELEASED:** November 5, 2009

**JOURNALIZED:**  
**ATTORNEYS FOR APPELLANTS**

John C. Henck  
John C. Henck and Associates Co.  
23240 Chagrin Blvd., Suite 535  
4 Commerce Park Square  
Beachwood, Ohio 44122

Walter H. Krohngold  
100 Franklin's Row  
34305 Solon Road  
Solon, Ohio 44139

Martin T. Powers  
55 Public Square  
Suite 1055  
Cleveland, Ohio 44113

**ATTORNEYS FOR APPELLEES**

**For A.R. Goodman Enterprises, Inc.**

Robert H. Eddy  
Timothy J. Fitzgerald  
Julie L. Juergens  
Richard C.O. Rezie  
Gallagher Sharp  
6<sup>th</sup> Floor, Bulkley Building  
1501 Euclid Avenue  
Cleveland, Ohio 44115

**For Allstate Insurance Co.**

Stanley S. Keller  
Mazanec, Raskin, Ryder & Keller Co., LPA  
34305 Solon Road  
Solon, Ohio 44139

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

COLLEEN CONWAY COONEY, A.J.:

{¶ 1} Plaintiff-appellant, Lushion White (“White”), appeals the trial court’s order awarding him \$0 in damages and denying his claim for attorney’s fees. Finding no merit to the appeal, we affirm.

{¶ 2} The facts of this case were previously set forth by this court in *White v. Allstate Ins. Co.*, Cuyahoga App. No. 89316, 2008-Ohio-140 (“*White I*”).

“This action is a consolidation of two lawsuits filed by appellants [White and Lisa Rice (‘Rice’) (collectively referred to as ‘appellants’)] concerning home repairs and insurance coverage arising after White’s property was damaged by fire in September 1998. Appellants commenced an action in July 2003 alleging breach of contract, respondeat superior, and bad faith against Allstate [defendant-appellee, Allstate Insurance Company (‘Allstate’)]; and breach of express, implied and quasi contract, against Goodman [defendant-appellee, A.R. Goodman Enterprises, Inc. (‘Goodman’)]. In January 2005, White filed a separate action against Goodman (serving the company at three different addresses) seeking a declaratory judgment and money damages for alleged violations of the ‘Home Sales Solicitation Act’ (‘HSSA’) and the ‘Consumer Sales Practices Act’ (‘CSPA’). The actions were consolidated and Allstate, Goodman, and White each moved for summary judgment.” *Id.* at ¶2.

{¶ 3} White moved for partial summary judgment on the issue of liability as to his claims against Goodman for violation of the HSSA and CSPA. Goodman and Allstate each moved for summary judgment on all of White’s claims against them. The trial court granted summary judgment in

favor of Goodman and Allstate and denied White’s motion for partial summary judgment.

{¶ 4} White and Rice appealed the trial court’s rulings, arguing that: (1) White is entitled to partial summary judgment on the issue of liability, only, against Goodman for its violation of the HSSA and CSPA; (2) the trial court erred in granting summary judgment in favor of Goodman; and (3) the trial court erred in granting summary judgment in favor of Allstate.

{¶ 5} This court affirmed in part and reversed in part, finding that the trial court erred in: (1) denying White’s motion for partial summary judgment; (2) granting Goodman’s motion for summary judgment on White’s claim for breach of contract and claims under HSSA and CSPA; and (3) granting Allstate’s motion for summary judgment on appellants’ claims of breach of contract and bad faith. We also found that the trial court did not err in: (1) granting Goodman’s motion for summary judgment on Rice’s claims; (2) dismissing White’s claims for breach of implied and quasi contract; and (3) granting summary judgment in favor of Allstate on appellants’ claim of respondeat superior.<sup>1</sup> Id. at ¶42, 61.

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<sup>1</sup>In *White I*, we held that the trial court’s granting of Goodman’s motion for summary judgment on the claims advanced by Rice was appropriate. We found that: “Rice had no contractual relationship with Goodman and was not the owner of the Property. White simply allowed Rice, his daughter, to continue living in the Property, where she had been a tenant prior to his purchase of it. There is no genuine issue of

{¶ 6} On remand, the trial court entered partial summary judgment in favor of White as to the issue of liability for Goodman’s violation of the HSSA and the claims under the CSPA.<sup>2</sup> After a hearing on the remaining issue of damages, the trial court found that White elected the remedy of cancellation under the HSSA and is not entitled to trebling of damages under the CSPA.<sup>3</sup> The trial court noted that the purpose of the HSSA is to shield consumers from contractors attempting to take advantage of the consumer. The trial court, relying on *Kamposek v. Johnson*, Lake App. No. 2003-L-124, 2005-Ohio-344, further noted that when the consumer uses the HSSA as a “sword” as opposed to a “shield,” the court may make an equitable determination of damages. The trial court found that White’s home was completely repaired and that White’s complaints involved improvements which he was not entitled to under his homeowner’s policy. As a result, the trial court awarded White \$0 in damages. The trial court also denied White’s claim for attorney’s fees, finding that because he elected his remedy under the HSSA, he could not obtain attorney’s fees under the CSPA.

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material fact concerning Rice’s claims against Goodman, which fail as a matter of law.” Id. at ¶40.

<sup>2</sup>White dismissed his claims against Allstate in December 2008.

<sup>3</sup>The court also entered judgment for Goodman on the breach of contract claim because White elected to cancel the contract.

{¶ 7} It is from this order that White appeals, raising two assignments of error. In the first assignment of error, White argues that the trial court erred in ruling that he was not entitled to damages as a result of Goodman's violations of the HSSA and CSPA. He claims that Goodman's failure to comply with R.C. 1345.23(A) and (B) of the HSSA is a violation under the CSPA, because under R.C. 1345.28, violations of the HSSA constitute deceptive practices as defined in R.C. 1345.02 of the CSPA. Thus, he contends that under the HSSA, Goodman was required to refund all contract funds (\$102,785.77) to White, and that under the CSPA, he is entitled to treble damages (\$308,357.31) and \$89,641.71 in attorney's fees as a result of Goodman's "willful refusal to return those funds." We disagree.

{¶ 8} As stated by this court in *White I*, a "home solicitation sale" is defined as:

"a sale of consumer goods or services in which the seller or a person acting for the seller engages in a personal solicitation of the sale at a residence of the buyer, including solicitations in response to or following an invitation by the buyer, and the buyer's agreement or offer to purchase is there given to the seller or a person acting for the seller, or in which the buyer's agreement or offer to purchase is made at a place other than the seller's place of business. \* \* \*' [R.C. 1345.21.]

'[H]ome improvement contracts generally fall within the purview of the HSSA." *Kamposek* \* \* \*, citing *Patterson v. Stockert* (Dec. 13, 2000), 5th Dist. No. 2000AP 01 0002.'" *White I* at ¶13-14.

{¶ 9} Under the HSSA, each home solicitation sale must be evidenced by a written agreement and include a statement of the buyer's right to cancel the contract until midnight of the third business day after the day on which the buyer signs the contract. See R.C. 1345.22 and 1345.23. If the agreement does not include a statement of the buyer's right to cancel, then the buyer's right to cancel does not expire. R.C. 1345.23(C). If the buyer decides to cancel the sale, the seller must refund all payments made under the contract to the buyer. R.C. 1345.23(D)(4)(a). Here, Goodman does not dispute that it did not give White notice of the buyer's right to cancel. *White I* at ¶33.

{¶ 10} We note that: “[t]he failure to comply with the HSSA constitutes a deceptive act or practice in connection with a consumer transaction in violation of the CSPA. R.C. 1345.21 to 1345.27; R.C. 1345.02. Thus, any violation of the HSSA is a violation of the CSPA. See R.C. 1345.28.” *White I* at ¶15. Under R.C. 1345.09, when a violation of the CSPA has been committed, a consumer may elect to rescind the contract or to sue for three times the amount of the actual damages.

{¶ 11} In *White I*, we found that White's home repairs fell within the coverage of the HSSA and White provided Goodman with his notice of cancellation in January 2005. Goodman argued, however, that White was



precluded from cancelling the contract because he elected his remedy by filing an action for damages under the contract. “White concede[d] that at some point he will be required to elect between these inconsistent claims but maintain[ed] he is permitted by the Civil Rules to maintain alternate inconsistent claims.” *Id.* at ¶34. Relying on *Kamposek*, we agreed and found that White was not precluded from pursuing these alternate inconsistent claims, but he “may not recover both damages and also cancel the contract.” *Id.* at ¶36.<sup>4</sup> Thus under the law of the case doctrine, on remand, White was required to elect one of the following remedies: (1) cancel the contract under the HSSA for a full refund of the contract price; (2) rescission of the contract under the CSPA; or (3) sue for actual damages under the CSPA.

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<sup>4</sup>“In *Kamposek*, the Eleventh District Court of Appeals dealt with a similar situation and held that ‘a buyer may not recover on two different theories for damages, but a buyer may assert alternative theories for recovery \* \* \*.’ *Id.* at [¶]26. Where HSSA applies to a transaction, the buyer may cancel a contract at any time prior to receiving notice of right to cancel from the seller. ‘If the sale is a service contract, the seller is not permitted to begin performance of the contract until the three-day period for the buyer to cancel has expired.’ *Id.* at ¶25 (this ‘put[s] the risk of loss on the seller if performance is begun prior to expiration of the buyer’s right to cancel.’)

\* \* \*

“Where the buyer exercises the right to cancel, there is ‘no reason to turn to the rescission [sic] provision of R.C. 1345.09.’ *Kamposek*, 2005-Ohio-344, ¶27.” *White I* at ¶35, 37.

{¶ 12} A review of the record reveals that White stated in his motion for partial summary judgment and in his brief in opposition to Goodman's motion to postpone damages hearing that he "will not be seeking rescission under the CSPA; White will be seeking damages." However, in his reply brief in support of damages hearing and revision of requested damages, he stated that he already exercised his right to cancel the contract under the HSSA and is entitled to treble damages under the CSPA. We note that White concedes that he cancelled the contract in January 2005 in accordance with the HSSA. See, also, *White I* at ¶33.

{¶ 13} At the damages hearing, White's counsel stated that "in lieu of going after \* \* \* damages, the plaintiff in this case has elected to cancel this contract under the Home Sales Solicitation Act." The matter proceeded over Goodman's objections and White presented evidence as to his actual damages and his attorney's fees.

{¶ 14} As the First District Court of Appeals in *Cas. Restoration Servs. v. Jenkins*, Hamilton App. No. C-060983, 2007-Ohio-5131, ¶8, stated:

"We \* \* \* refuse to allow a party who is making a claim under the OCSA through a violation of the HSSA to elect to pursue damages under the OCSA while retaining the right to rescind the contract under the HSSA. An OCSA claimant must elect a remedy prior to trial. While a party may file suit under both theories of recovery, an election must be made, and once it is made, the claimant must stand by that choice." [Internal citations omitted.]

{¶ 15} Based on White's concession that he cancelled the Goodman contract under the HSSA and counsel's statements at the start of the damages hearing, we find that White clearly elected the remedy of cancelling his contract under the HSSA. Having chosen to cancel the contract under the HSSA, White could not pursue damages under the CSPA. As we noted in *White I*, there is no reason to turn to the rescission provision of the CSPA, when the buyer exercises the right to cancel under the HSSA. *Id.* at ¶37, quoting *Kamposek*.

{¶ 16} Furthermore, regardless of the fact that White sent his notice of cancellation under the HSSA, his action resulted in the rescission of the contract. "Once the consumer has chosen to rescind, or cancel, the contract, he is not entitled to recover damages under the [CSPA]." *Clemens v. Duwel* (1995), 100 Ohio App.3d 423, 433, 654 N.E.2d 171. He cannot cancel the contract in one context and still claim a right to enforce it in another context. See *Cas. Restoration Servs.* at ¶9, citing *Clemens*. Therefore, in choosing to cancel the contract in accordance with his rights under the HSSA, White also effectually elected rescission rather than actual or treble damages under the CSPA. See *Clemens* at 433.

{¶ 17} Under the HSSA, White was entitled to a refund of the full contract price (\$102,785.77), unless he used the HSSA as a "sword" as

opposed to a “shield.” “[W]hile there is no ‘clean hands’ provision in the HSSA, the [*Kamposek* court] caution[ed] against the scenario where a buyer enters into a contract solely to take advantage of the seller’s possible failure to provide notice of the right to cancel. The HSSA is intended to be a ‘shield’ for the consumer, not a ‘sword.’ In such a situation, the trial court would certainly have the discretion to make an equitable determination of damages.” *Kamposek* at ¶33.<sup>5</sup> Thus, we will not disturb the trial court’s determination absent an abuse of discretion. “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* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

{¶ 18} In the instant case, the trial court determined that Goodman began to perform repairs on White’s home in September 1998. Most of the work was completed in a reasonable time, and the majority of White’s complaints involved improvements that White requested, but was not entitled to under his homeowner’s policy. Furthermore, several of the problems were fixed and the house was restored to its original condition. Nearly six years

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<sup>5</sup>This court relied on *Kamposek* in support of our judgment in *White I*.

passed after Goodman’s work had been completed before White issued his notice of cancellation under the HSSA in January 2005.

{¶ 19} We agree with the trial court’s finding that White is attempting to use the HSSA as a sword to obtain a full refund even though his house was completely repaired. Therefore, we find that the trial court’s equitable damages determination of \$0 was not an abuse of discretion.<sup>6</sup>

{¶ 20} Accordingly, the first assignment of error is overruled.

{¶ 21} In the second assignment of error, White argues that the trial court erred in denying him attorney’s fees under the CSPA.

{¶ 22} R.C. 1345.09(F)(2) provides that the trial court “may award \* \* \* a reasonable attorney’s fee \* \* \* if \* \* \* the supplier has knowingly committed an act or practice that violates this chapter.” Thus, the provision leaves the decision to award fees to the sound discretion of the trial court. See, also, *Cas. Restoration Servs.* at ¶14.

{¶ 23} In the instant case, the trial court declined to award attorney’s fees because White elected a remedy under the HSSA, not the CSPA. Having found that White elected his remedy to cancel the contract under the

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<sup>6</sup>White also argues that the trial court erred in determining that he did not suffer any actual or economic damages under the CSPA because he did not provide any out-of-pocket money to Goodman. We decline to address this argument in light of our finding that White is precluded from recovery under the CSPA.

HSSA that contains no provision for attorney's fees, we find that the trial court's denial of attorney's fees was proper.

{¶ 24} Accordingly, the second assignment of error is overruled.

Judgment is affirmed.

It is ordered that appellees recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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COLLEEN CONWAY COONEY, ADMINISTRATIVE JUDGE

MARY EILEEN KILBANE, J., and  
LARRY A. JONES, J., CONCUR