[Cite as *Brunke v. Ohio State Home Servs., Inc.*, 2015-Ohio-2087.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	

DAMON BRUNKE	C.A. No. 13CA010500
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
OHIO STATE HOME SERVICES, INC.	COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO
Appellant	CASE No. 05CV142449

DECISION AND JOURNAL ENTRY

Dated: June 1, 2015

MOORE, Judge.

{¶1} Defendant, Ohio State Home Services, Inc. ("Home Services"), appeals from the judgment of the Lorain County Court of Common Pleas. This Court affirms in part, reverses in part, and remands this matter to the trial court for further proceedings consistent with this decision.

I.

{¶2} In a prior appeal, this Court set forth a portion of the relevant facts and procedural history of this case as follows:

> On March 20, 2004, [] Damon and Holly Brunke (collectively "the Brunkes"), entered into a contract with [Home Services] to have the basement of their home waterproofed for $12,350 [("the first work agreement")]. The Brunkes were unable to obtain the necessary financing. On July 10, 2004, the Brunkes entered into a revised agreement with [Home Services] providing for a reduced level of waterproofing work at a lower price of $8,000 [("the second work agreement")]. This time, the Brunkes were able to secure partial financing. Their dissatisfaction with [Home Services], however, led to the deterioration of the parties' contractual relationship and the initiation of this suit.

> On June 15, 2005, the Brunkes filed an action against [Home Services] and several other parties who are not a part of this appeal. The Brunkes'[] complaint included, but was not limited to, claims for fraud, breach of contract, breach of warranty, failure to perform in a workmanlike manner, and violations of the Ohio Consumer Sales Practices Act [("CSPA")] and the Home Solicitation Sales Act [("HSSA")].

Brunke v. Ohio State Home Servs., Inc., 9th Dist. Lorain No. 08CA009320, 2008-Ohio-5394, ¶ 2-3.

{¶3} Thereafter, Home Services sought to compel arbitration. *Id.* at ¶ 4. The trial court granted Home Services' motion to compel arbitration as to certain claims, and both the Brunkes and Home Services appealed the court's order. *Id.* at ¶ 4-5. We reversed the trial court's decision and remanded the matter for a hearing on the arbitration provision. After hearing, the trial court determined that the arbitration provision was unconscionable. *Id.* at ¶ 5. Home Services then appealed the trial court's decision finding the arbitration provision unconscionable, and we affirmed. *Id.* at ¶ 18-19.

{¶4} Thereafter, the Brunkes filed an amended complaint. Subsequently, the Brunkes moved for partial summary judgment on their claims against Home Services. Home Services responded in opposition. The trial court granted the Brunkes' motion in a journal entry dated September 13, 2011. In ruling on the Brunkes' motion, the trial court stated that it "considered all of the materials submitted" and found that "there [we]re no genuine issues of material fact and the [Brunkes] [we]re entitled to judgment as a matter of law." The court further found that Home Services "knowingly violated the [CSPA] and the [HSSA], and breached it[s] contract in it[s] dealings with the [Brunkes]." The court awarded the Brunkes damages in the amount of $116,421.58, which reflected the amount of damages that the Brunkes had calculated in their motion for summary judgment. The court further ordered that the matter be scheduled for a hearing on the calculation of the Brunkes' attorneys' fees.

{¶5} Home Services appealed, and we dismissed the appeal for lack of a final appealable order because the September 13, 2011 journal entry did not resolve all of the claims and did not certify the matter for immediate appeal under Civ.R. 54(B). *See Brunke v. Ohio State Home Servs., Inc.*, 9th Dist. Lorain No. 11CA010082 (Dec. 19, 2011). Thereafter, the trial court held a hearing to determine attorneys' fees and issued an order dated June 10, 2013, granting attorneys' fees to the Brunkes. Home Services again appealed, and we again dismissed the appeal for lack of a final appealable order because the trial court had yet to resolve all claims against all parties and did not certify the matter for immediate appeal under Civ.R. 54(B). *See Brunke v. Ohio State Home Servs., Inc.*, 9th Dist. Lorain No. 13CA010432 (Oct. 2, 2013).

{¶6} Thereafter, the Brunkes filed a voluntary dismissal without prejudice of all of their outstanding claims which were not ruled upon in the September 13, 2011 entry. The trial court issued a journal entry on October 21, 2013 in which it dismissed the Brunkes' remaining claims, leaving no further claims to be decided.[1]

{¶7} Home Services appealed, and it now raises three assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

> [THE BRUNKES'] MOTION FOR SUMMARY JUDGMENT WAS GRANTED IN ERROR BECAUSE THERE ARE GENUINE ISSUES OF MATERIAL

[1] We note that the Brunkes' voluntary dismissal without prejudice of the remainder of their claims against Home Services, pursuant to Civ.R. 41(A)(1), was ineffective to create a final, appealable order. *Pattison v. W.W. Grainger, Inc.*, 120 Ohio St.3d 142, 2008-Ohio-5276, ¶ 1. However, in this case, the trial court entered an order, as authorized by Civ.R. 41(A)(2), dismissing the remaining claims, which was a final appealable order. It is from that order that the Brunkes filed their notice of appeal.

A counterclaim filed by a defendant not a party to this appeal was resolved through a journal entry dated June 5, 2008.

> FACT AND AS A MATTER OF LAW [THE] BRUNKE[S ARE] NOT ENTITLED TO SUMMARY JUDGMENT.

{¶8} In its first assignment of error, Home Services argues that the trial court erred in granting summary judgment to the Brunkes on their claims.

{¶9} We review an award of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). We apply the same standard as the trial court, viewing the facts of the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co.*, 13 Ohio App.3d 7, 12 (6th Dist.1983).

{¶10} Pursuant to Civ.R. 56(C), summary judgment is proper only if:

> (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

Temple v. Wean United, Inc., 50 Ohio St.2d 317, 327 (1977). The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and pointing to parts of the record that show the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-93 (1996). "If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied." *Id.* at 293. If the moving party fulfills this burden, then the burden shifts to the nonmoving party to prove that a genuine issue of material fact exists. *Id*.

{¶11} Here, in support of their motion, the Brunkes attached the affidavit of Holly Brunke. Ms. Brunke averred that, after a representative of Home Services quoted an estimate to waterproof the Brunkes' basement and repair damage to a concrete block wall, she entered into a contract for waterproofing with Home Services for $12,350 ("the first work agreement"). The

first work agreement is attached to the motion for summary judgment and is dated May 20, 2004.[2] Attached to the first work agreement is a document entitled "Notice of Right to Cancel."

{¶12} In order to fund the work, Ms. Brunke averred that she entered into a financing agreement with Home Services in which it would finance $12,290 at a rate of 8.9% ("the financing agreement"). The financing agreement is attached to the motion for summary judgment and is also dated March 20, 2004.

{¶13} Thereafter, Home Services advised Ms. Brunke that her financing application was denied. She later was contacted by a mortgage broker and entered into an agreement with a lender to refinance her mortgage. Ms. Brunke averred that the refinancing agreement provided insufficient funds to cover the price of the waterproofing project under the first work agreement.

{¶14} On July 10, 2004, the Brunkes and Home Services entered into an agreement ("the second work agreement"). The second work agreement is attached to the motion for summary judgment and is dated July 10, 2004. Therein, the Brunkes agreed to pay Home Services $8,000 in exchange for a decreased level of work than had been agreed in the first work agreement.

{¶15} Ms. Brunke maintained that, on April 22, 2005, she "sent a letter to [Home Services] canceling the contract and requesting a full refund. [Home Services] refused to honor

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[2] In her affidavit, although Ms. Brunke discussed and made averments pertaining to the written agreements between the parties, she did not purport to incorporate or authenticate the copies of the agreements and other documents attached to the motion for summary judgment. *See King v. Rubber City Arches, L.L.C.*, 9th Dist. Summit No. 25498, 2011-Ohio-2240, ¶ 24, citing *Bowmer v. Dettelbach*, 109 Ohio App.3d 680, 684 (6th Dist.1996) ("[T]he trial court may consider a type of document not expressly mentioned in Civ.R. 56(C) if such document is 'incorporated by reference in a properly framed affidavit pursuant to Civ.R. 56(E).'"). However, "[w]here the opposing party fails to object to the admissibility of the evidence under Civ.R. 56, the court may, but need not, consider such evidence when it determines whether summary judgment is appropriate." *Bowmer* at 684. As Home Services did not object to the attachments, and the court expressly considered all exhibits and affidavits attached to the motion when deciding the issue, we will proceed likewise.

[the Brunkes'] valid cancellation notice." A copy of the cancellation letter is attached to the motion for summary judgment. The letter indicates that it was addressed to Home Services at the address set forth in the agreements between the Brunkes and Home Services.

{¶16} Based in part upon these transactions between the Brunkes and Home Services, the Brunkes maintained that summary judgment in their favor and damages were appropriate on the following CSPA claims against Home Services for (1) violation of the CSPA through a violation of the HSSA requirements as to notice of the right to cancel, (2) violation of the CSPA through breach of contract, (3) violation of the CSPA through Home Services' failure to honor the Brunkes' notice of cancellation[3] of the contract.

{¶17} For purposes of our discussion, we note that there is no dispute that the transactions at issue here are subject to the provisions of the HSSA and the CSPA. The HSSA, contained in R.C. 1345.21 *et seq.*, governs "[h]ome solicitation sale[s]" which include, subject to exceptions that the parties do not argue are relevant here, "sale[s] 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(A). A violation of the HSSA constitutes a violation of the CSPA. R.C. 1345.28.

[3] Although the Brunkes have intermittently referred to their letter as a "rescission" of the contract, we will refer to it as a "cancellation" to avoid confusion between the remedy of rescission for a violation of the CSPA, provided to consumers under R.C. 1345.09(B), and the right to cancel, provided to buyers under R.C. 1345.23. *See Kamposek v. Johnson*, 11th Dist. No. 2003-L-124, 2005-Ohio-344, ¶ 27.

{¶18} In *Johnson v. Microsoft Corp.*, 106 Ohio St.3d 278, 2005-Ohio-4985, ¶ 24, the Supreme Court of Ohio explained that the CSPA:

> [P]rohibits suppliers from committing either unfair or deceptive consumer sales practices or unconscionable acts or practices as catalogued in R.C. 1345.02 and 1345.03. In general, the CSPA defines "unfair or deceptive consumer sales practices" as those that mislead consumers about the nature of the product they are receiving, while "unconscionable acts or practices" relate to a supplier manipulating a consumer's understanding of the nature of the transaction at issue.

{¶19} R.C. 1345.02(A) provides that an unfair or deceptive act or practice in connection with a consumer transaction "by a supplier violates this section whether it occurs before, during, or after the transaction."

{¶20} R.C. 1345.09(B) provides:

> Where the violation was an act or practice declared to be deceptive or unconscionable by rule adopted under division (B)(2) of section 1345.05 of the Revised Code before the consumer transaction on which the action is based, or an act or practice determined by a court of this state to violate section 1345.02, 1345.03, or 1345.031 of the Revised Code and committed after the decision containing the determination has been made available for public inspection under division (A)(3) of section 1345.05 of the Revised Code, the consumer may rescind the transaction or recover, but not in a class action, three times the amount of the consumer's actual economic damages or two hundred dollars, whichever is greater, plus an amount not exceeding five thousand dollars in noneconomic damages or recover damages or other appropriate relief in a class action under Civil Rule 23, as amended.

{¶21} With the above summary judgment principles and relevant statutory provisions in mind, we will separately review the propriety of the trial court's grant of summary judgment with respect to each of the claimed CSPA violations, addressing them out of the order in which they were presented below and on appeal in order to facilitate our discussion.

CSPA Claim Pertaining to Breach of Contract

{¶22} We first address the Brunkes' claim for treble damages for violation of the CSPA through breach of contract. "[A] breach of contract occurs when a party demonstrates the

existence of a binding contract or agreement; the non-breaching party performed its contractual obligations; the other party failed to fulfill its contractual obligations without legal excuse; and the non-breaching party suffered damages as a result of the breach." *Laurent v. Flood Data Servs., Inc.*, 146 Ohio App.3d 392, 398, 2001-Ohio-1660 (9th Dist.), quoting *Garofalo v. Chicago Title Ins. Co.*, 104 Ohio App.3d 95, 108 (8th Dist.1995). "Where the parties, following negotiations, make mutual promises which thereafter are integrated into an unambiguous written contract, duly signed by them, courts will give effect to the parties' expressed intentions." (Citation omitted.) *Aultman Hosp. Assn. v. Community Mutual Ins. Co.*, 46 Ohio St.3d 51, 53 (1989). A knowing breach of contract by a supplier may constitute an unfair, deceptive and unconscionable act, thus violating the CSPA. *See* R.C. 1345.02, RC 1345.03, and *Zimmerman v. U.S. Diamond & Gold Jewelers, Inc.*, 2d Dist. Montgomery No. 14680, 1995 WL 100820, *3 (Mar. 8, 1995).

{¶23} In their motion, the Brunkes maintained that the financing agreement was a binding contract between themselves and Home Services. The copy of the financing agreement submitted by the Brunkes[4] is contained on a form entitled "Home Improvement Retail Installment Contract Ohio[.]" The agreement lists Home Services as the "Seller" and the Brunkes as the "Buyer[s.]" The agreement refers to the Sellers as "[w]e" and "us" in the agreement and the Buyers as "[y]ou" and "your[.]" The financing agreement states in part that "[y]ou agree to purchase from us the goods and/or services described below according to the terms of this Contract." The description of the "[G]oods and/or [S]ervices [P]urchased" is filled in as "Basement Waterproofing[.]" The agreement further provides in part that "[y]ou agree to

[4] The copy of the financing agreement attached the Brunkes' motion for summary judgment does not contain the bottom portion of the form. However, the full document is attached as an exhibit to the Brunkes' reply in support of summary judgment.

pay this Contract according the payment schedule and charge provisions shown in the TRUTH IN LENDING DISCLOSURES. You also agree to pay any additional amounts according to the terms of this Contract." (Capitalization sic.) The Truth in Lending Disclosures written on the form provide the amount financed as $12,290.00 at an annual percentage rate of 8.9%. The form indicates that "'e' means an estimate," but the letter "e" appears by none of the numbers in the Truth in Lending Disclosures. The form contains lines for the signature of the Seller and Buyers, and is signed on the Seller's line by an individual named "Chris Simpson" and on the Buyers' lines by the Brunkes.

{¶24} Ms. Brunke averred in her affidavit that Home Services did not provide financing for basement waterproofing as agreed in the financing agreement. Accordingly, the Brunkes maintained that Home Services breached the agreement. In doing so, the Brunkes argued that Home Services violated the CSPA.

{¶25} Based upon Ms. Brunke's affidavit, the plain language of the financing agreement, and the applicable law, we conclude that the Brunkes met their initial *Dresher* burden of demonstrating the absence of a question of fact and that they were entitled to judgment as a matter of law on this claim.

{¶26} In response, Home Services did not dispute that it failed to provide financing as set forth in the financing agreement. Nor did it dispute the proposition that a knowing breach of contract violates the CSPA. Instead, it maintained that the financing agreement was not a "contract" for financing. Home Services explained that "[t]he Brunkes si[gn]ed a credit application and financing document *that would become effective if th[eir] credit application was accepted by a third-party lender (South Central Bank).*" (Emphasis added.) In support, Home

Services provided the affidavit of Frank J. Bauck, Sales Manager for Home Services.[5] In his affidavit, Mr. Bauck averred that Home Services "has never provided direct financing for waterproofing jobs. [Home Services] allows its customers to use third-party financing to pay for our services." Mr. Bauck further averred that "[w]hen the [Home Services'] salesman sold the Brunkes our services[,] the Brunkes opted to pay for our services by obtaining third-party financing." Mr. Bauck maintained that when the Brunkes signed the first work agreement, they also "signed a credit application for South Central Bank and South Central Bank's standard retail installment contract that they (sic.) provide."

{¶27} However, viewing the evidence in the light most favorable to Home Services, there is no dispute that Home Services and the Brunkes are the only parties listed on the financing agreement, that none of the figures on the financing agreement are noted as estimates, and that the parties signed the financing agreement. Further, there is no indication on the financing agreement that its terms were contingent upon any further approval from Home Services or any other entity. Therefore, even taking as true Mr. Bauck's statement that Home Services does not directly finance waterproofing jobs, its failure to do so in this instance, where it had contracted itself to do so, resulted in a breach of that contract. Accordingly, we conclude that Home Services failed to meet its reciprocal *Dresher* burden of establishing a question of fact on this claim.

[5] The Brunkes filed a motion to strike the affidavit of Frank Bauck, claiming he lacked personal knowledge of the matters to which he averred. The trial court never ruled on the motion, and thus we presume it was denied. *See Towns v. WEA Midway, LLC*, 9th Dist. Lorain No. 06CA009013, 2007-Ohio-5121, ¶ 16. Further, the trial court specifically indicated that it reviewed all of the attachments to parties' summary judgment filings in reaching its decision. The Brunkes do not challenge the trial court's failure to grant their motion to strike in their Appellees' Brief, and thus we will consider the averments in Mr. Bauck's affidavit.

{¶28} Therefore, to the extent that Home Services challenges the trial court's grant of summary judgment to the Brunkes on their claim for treble damages for violation of the CSPA through breach of contract, its first assignment of error is overruled.

Deficient Notice of Right to Cancel

{¶29} Home Services also challenges the trial court's grant of summary judgment to the Brunkes on their claim for statutory damages resulting from Home Services' violation of the CSPA through a violation of the HSSA regulations pertaining to notice of the buyer's right to cancel.

{¶30} With respect to this claim, the Brunkes alleged several violations of the HSSA. Because any violation of the HSSA necessarily violates the CSPA, the Brunkes had to demonstrate the nonexistence of a material fact as to one of these violations in order to establish that they were entitled to the requested judgment. *See* R.C. 1345.28 (A violation of the HSSA constitutes a violation of the CSPA.). Accordingly, we will limit our review to the alleged violation of R.C. 1345.23, as it is dispositive of this claim.

{¶31} R.C. 1345.23(B)(2) provides, in relevant part:

> A completed form, in duplicate, captioned "notice of cancellation", shall be attached to the contract signed by the buyer and be easily detachable, and [] shall contain in ten-point, bold-face type, the following information and statements in the same language as that used in the contract:
>
> NOTICE OF CANCELLATION
>
> You may cancel this transaction, without any penalty or obligation, within three business days from the above date.
>
> If you cancel, any property traded in, any payments made by you under the contract or sale, and any negotiable instrument executed by you will be returned within *ten business days* following receipt by the seller of your cancellation notice, and any security interest arising out of the transaction will be cancelled.
>
> If you cancel, you must make available to the seller at your residence, in substantially as good condition as when received, any goods delivered to you

> under this contract or sale; or you may if you wish, comply with the instructions of the seller regarding the return shipment of the goods at the seller's expense and risk.
>
> If you do make the goods available to the seller and the seller does not pick them up within twenty days of the date of your notice of cancellation, you may retain or dispose of the goods without any further obligation. If you fail to make the goods available to the seller, or if you agree to return the goods to the seller and fail to do so, then you remain liable for performance of all obligations under the contract.
>
> To cancel this transaction, mail or deliver a signed and dated copy of this cancellation notice or any other written notice, or send a telegram, to ___[(Name of seller),]___ at ___[(address of seller's place of business)]___ not later than midnight of ___[(Date)]___
>
> I hereby cancel this transaction.
>
> ___[(Date)]___

(Emphasis added.)

{¶32} In their motion for summary judgment, the Brunkes maintained in part that the notice of right to cancel provided to them by Home Services with the first work agreement failed to comply with the form set forth in R.C. 1345.23(B)(2). In support, the Brunkes attached a copy of the notice of right to cancel. The notice sets forth, in relevant part, that "[w]ithin *20 calendar days* after [Home Services] receive[s] [the Brunkes'] notice [of cancelation], [Home Services] must take the steps necessary to reflect the fact that the [mortgage/lien/security interest] [on/in] [the Brunkes'] home has been cancelled, and [Home Services] must return to [the Brunkes] any money or property [the Brunkes] have given to [Home Services] or to anyone else in connection with this transaction." (Emphasis added.) Because the language in the notice provides that Home Services could return the money within *twenty calendar days* of the receipt of the notice of cancellation instead of *ten business days*, as required by R.C. 1345.23(B)(2), the notice fails to comport with the HSSA. *See Knight v. Colazzo*, 9th Dist. Summit No. 24110, 2008-Ohio-6613, ¶ 17 (where a notice of the right to cancel under the HSSA does not contain the required

statutory language, the seller has committed a violation of the HSSA). Accordingly, we conclude that the Brunkes met their initial *Dresher* burden of establishing the nonexistence of a question of material fact and they are entitled to judgment as a matter of law on this claim.

{¶33} Neither in response to the motion for summary judgment, nor on appeal, has Home Services disputed that the notice of right to cancel expressly provided for twenty calendar days from the date it received a notice of cancellation for it to return the money to the Brunkes, in contravention of the language contained in R.C. 1345.23(B)(2). However, in its brief in opposition to the motion for summary judgment and in its appellate brief, Home Services maintains that its notice of the right to cancel was sufficient pursuant to R.C. 1345.23(B)(4), which provides:

> A home solicitation sales contract which contains the notice of buyer's right to cancel and notice of cancellation in the form and language provided in the federal trade commission's trade regulation rule providing a cooling-off period for door-to-door sales shall be deemed to comply with the requirements of divisions (B)(1), (2), and (3) of this section with respect to the form and language of such notices so long as the federal trade commission language provides at least equal information to the consumer concerning his right to cancel as is required by divisions (B)(1), (2), and (3) of this section.

{¶34} Home Services then concludes, without reference to the federal trade commission's trade regulation rule discussed in R.C. 1345.23(B)(4), that "[Home Services] did provide equal information to [the] Brunke[s] in the notice that was provided. [The] Brunke[s] [were] notified that they had the right to receive their deposit money back in the notice. See [Home Services] Exhibit 3 in its brief in Opposition. As such, there is a genuine issue of material fact on this issue and summary judgment was not appropriate." The Exhibit referenced in this quotation is the notice of right to cancel as provided by the Brunkes that indicates that Home Services had twenty calendar days in which to return the Brunkes their money after a notice of cancellation.

{¶35} Thus, despite Home Services' statement otherwise, there is no dispute of fact on this issue: the notice of right to cancel provided twenty days for Home Services to return the Brunkes' money after receiving a notice of cancellation. This is in contravention to R.C. 1345.23(B)(2). Further, the federal trade commission's trade regulation rule referred to in R.C. 1345.23(B)(4) is located at 16 C.F.R. 429.1. This rule provides a form notice which also requires that the seller notify the buyer that the seller has *ten business days* to return payment after cancellation. *See* 16 C.F.R. 429.1 ("If you cancel, any property traded in, any payments made by you under the contract or sale, and any negotiable instrument executed by you will be returned within TEN BUSINESS DAYS following receipt by the seller of your cancellation notice, and any security interest arising out of the transaction will be cancelled." Because we can find no math formula in which twenty is equal to ten, we find it difficult to discern Home Services' argument on this point.

{¶36} Accordingly, we conclude that Home Services failed to meet its reciprocal *Dresher* burden as to this claim. Therefore, the trial court did not err in granting the Brunkes summary judgment on their claim for violation of the CSPA through violation of R.C. 1345.23. Accordingly, Home Services' first assignment of error, insofar as it pertains to this claim, is overruled. Because the Brunkes needed to prove only one HSSA violation to recover statutory damages under the CSPA on this claim, we decline to review whether a material fact existed as to the remaining alleged violations pertaining to the notice of the right to cancel, as they are rendered moot.

Failing to Honor Cancellation Notice

{¶37} Relying upon the deficient notice of the right to cancel, the Brunkes also moved for summary judgment and statutory damages on their claim that Home Services violated the

CSPA by failing to honor their cancellation. The Brunkes maintained that, because they did not receive sufficient notice of the right to cancel, they had the right to cancel the contract at any time.

{¶38} As partially set forth in our discussion above, R.C. 1345.23(B) requires a seller to provide the buyer with a notice of the right to cancel containing certain information and statements. R.C. 1345.23(C) provides:

> (C) Until the seller has complied with divisions (A) and (B) of this section the buyer may cancel the home solicitation sale by notifying the seller by mailing, delivering, or telegraphing written notice to the seller of his intention to cancel. The three day period prescribed by section 1345.22 of the Revised Code begins to run from the time the seller complies with divisions (A) and (B) of this section.

{¶39} A seller is obligated to honor a notice of cancellation under R.C. 1345.23(D)(4)[6], which provides:

> In connection with any home solicitation sale, no seller shall * * * [f]ail or refuse to honor any valid notice of cancellation by a buyer and within ten business days after receipt of such notice to:
>
> (a) *Refund all payments made under the contract or sale*;
>
> (b) Return any goods or property traded in, in substantially as good condition as when received by the seller;
>
> (c) Cancel and return any note, negotiable instrument, or other evidence of indebtedness executed by the buyer in connection with the contract or sale and take any action necessary or appropriate to reflect the termination of any security interest or lien created under the sale or offer to purchase.

(Emphasis added.)

[6] In their motion for summary judgment, the Brunkes cited R.C. 1345.23(C) as the provision violated by Home Services through its purported failure to honor the notice of cancellation. However, R.C. 1345.23(C), quoted in our discussion above, does not impose obligations on the seller. Instead, it pertains to when the buyer may cancel a HSSA contract. In their Appellees' brief, the Brunkes direct us to R.C. 1345.23(D)(4), and Home Services does not dispute that this is the statute pertinent to the purported violation here.

{¶40} In Ms. Brunke's affidavit, she averred that she canceled the contract by sending a letter to Home Services on April 22, 2005. A copy of this letter was attached to the Brunkes' motion for summary judgment. The letter is addressed to Home Services, signed by the Brunkes, and states:

> It is my intention not to be bound to the home solicitation sale that I entered into with you on March 20, 2004. The home solicitation sale was for waterproofing my basement. Please refund all of the money that has been paid because of the home solicitation sale. Send the check to Holly Brunke at * * *.
>
> Thank you in advance for your prompt attention to this matter[.]

{¶41} Thus, in the Brunkes' letter, they specifically referred to cancelation of the home solicitation sale that they entered into with Home Services on March 20, 2004. As we stated in our discussion above, the Brunkes and Home Services entered into two agreements on March 20, 2004: the first work agreement and the financing agreement. In their motion for summary judgment the Brunkes maintained that Home Services failed to honor the notice of cancellation of "the financing agreement[.]" We cannot discern from the motion for summary judgment or its attachments in what way Home Services *failed to honor the notice of cancellation of the financing agreement*. This is especially true in light of our discussion above, in which we determined that no issue of fact existed as to the Brunkes' claim that *Home Services breached the financing agreement by failing to provide the financing in accordance with the agreement*.

{¶42} Accordingly, we conclude that the Brunkes failed to meet their initial *Dresher* burden of establishing the absence of a question of fact as to their claim for violation of the CSPA through Home Services' purported failure to honor the cancelation request as it relates to the financing agreement. Accordingly, the burden never shifted to Home Services to respond to the motion on this claim. *See Dresher*, 75 Ohio St.3d at 293. To this extent, Home Services' first assignment of error is sustained.

ASSIGNMENT OF ERROR II

THE TRIAL COURT ERRED IN CALCULATING THE DAMAGES THAT WERE AWARDED TO [THE BRUNKES].

{¶43} In its second assignment of error, Home Services argues that the trial court erred in its calculation of damages relative to the claim for the CSPA violation based upon breach of contract.

{¶44} In their motion for summary judgment, the Brunkes maintained that they were entitled to damages in the amount of $116,421.58, of which $116,021.58 was attributable to treble damages under the CSPA based upon breach of contract. *See* R.C. 1345.09(B) (permitting recovery of treble damages for certain CSPA violations and statutory damages of $200 per violation).

{¶45} In their motion for summary judgment, the Brunkes maintained that Home Services' breach of the financing agreement resulted in damages to the Brunkes, who then refinanced their mortgage to pay for the work to their basement. The Brunkes calculated damages caused by the breach by first taking the sum of payments made on their refinanced mortgage and subtracting the amount the payments would have been under their previous mortgage from August 1, 2004 through October 1, 2006. They then subtracted $155.01 per month, which represented what they would have been charged under the financing agreement. They then added two payments that they claimed were inappropriately paid from the refinanced mortgage to creditors for debts they had previously discharged in bankruptcy, and they added the amount of closing costs of the refinancing mortgage. This resulted in a total amount of actual damages of $38,673.86, which, when trebled, equals $116,021.58.

{¶46} In response to the Brunkes' motion for summary judgment, Home Services did not contest the Brunkes' method of calculating damages, but instead only maintained that questions of fact remained as to the Brunkes' underlying claims.

{¶47} "It is axiomatic that a litigant who fails to raise an argument in the trial court forfeits his right to raise that issue on appeal." *Garvey v. Vermilion*, 9th Dist. Lorain No. 10CA009873, 2012-Ohio-1258, ¶ 33, quoting *Stefano & Assoc., Inc. v. Global Lending Group, Inc.*, 9th Dist. Summit No. 23799, 2008-Ohio-177, ¶ 18, citing *State v. Byrd*, 32 Ohio St.3d 79, 87 (1987). Because Home Services failed to contest the calculation of damages below, it has forfeited all argument as to damages except for that of plain error. *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 121 (1997). "In appeals of civil cases, the plain error doctrine is not favored and may be applied only in the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself." *Id.* at syllabus. However, Home Services has not advanced a plain error argument in its brief, and we are not inclined to create one on its behalf.

{¶48} Further, Home Services maintains in its appellant's brief that certain damages were recovered by the Brunkes from other defendants through their settlements with these defendants. However, because Home Services did not raise this argument below, no evidence supporting this allegation appears in the record. "Although this Court conducts a de novo review of summary judgment, it is nonetheless a review that is confined to the trial court record." *Chiancone v. Akron*, 9th Dist. Summit No. 26596, 2014-Ohio-1500, ¶ 20, quoting *Roberts v. Reyes*, 9th Dist. Lorain No. 10CA009821, 2011-Ohio-2608, ¶ 9, quoting *Owens v. French Village Co.*, 9th Dist. Wayne No. 98CA0038, 1999 WL 635722, *1 (Aug. 18, 1999).

{¶49} Accordingly, Homes Services' second assignment of error is overruled.

ASSIGNMENT OF ERROR III

> THE TRIAL COURT ERRED IN AWARDING AND CALCULATING THE ATTORNEYS' FEES THAT WERE AWARDED TO THE [BRUNKES].

{¶50} In its third assignment of error, Home Services argues that the trial court erred in awarding and calculating the Brunkes' attorneys' fees.

{¶51} The CSPA provides for an award of attorney fees to a prevailing party under certain conditions:

> The court may award to the prevailing party a reasonable attorney's fee limited to the work reasonably performed, if either of the following apply:
>
> (1) The consumer complaining of the act or practice that violated this chapter has brought or maintained an action that is groundless, and the consumer filed or maintained the action in bad faith;
>
> (2) The supplier has knowingly committed an act or practice that violates this chapter.

Former R.C. 1345.09(F).

{¶52} Here, Home Services maintains that the trial court (1) erred in granting summary judgment to the Brunkes on the issue that the CSPA violations were committed "knowingly," thus warranting attorney fees and (2) erred in the calculation of attorney fees.

{¶53} First, as to the "knowingly" requirement, Home Services argues that the Brunkes failed to establish the "*scienter* requirement necessary to impose attorney's fees[,]" and that "the trial court acted as trier of fact and awarded [the] Brunke[s] attorney[s'] fees in its one paragraph decision which did not list a single fact or piece of evidence that it relied upon in holding that [Home Services] had *knowingly* violated the CSPA." (Emphasis sic.) However, Home Services' argument as to the necessity of the scienter requirement appears inconsistent with the state of the law that Home Services presented in its brief in opposition to summary judgment, wherein Home

Services acknowledged that the Supreme Court has interpreted the "knowingly" language in R.C. 1345.09(F)(2) to mean 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 (1990). All of the acts alleged by the Brunkes as attributable to Home Services appear to be intentional acts. Therefore, we conclude that Home Services' apparent argument, advanced for the first time on appeal, that the Brunkes were required to demonstrate that it intentionally violated the law, lacks merit. Accordingly, Home Services' third assignment of error is overruled to this extent.

{¶54} Next, with respect the trial court's calculation of attorneys' fees, given our resolution of the first assignment of error, this matter must be remanded for further proceedings on the Brunkes' claim for violation of the CSPA through Home Services' purported failure to honor the cancellation request. Therefore, our review of the method of calculation of attorneys' fees would be premature, as the trial court could alter the fee awarded after further proceedings. *See Bittner v. Tri-Cty. Toyota, Inc.*, 58 Ohio St.3d 143, 145-46 (1991) (among other factors, trial court may consider the number of hours reasonably expended on the litigation and degree of success in determining an attorney fee award pursuant to R.C. 1345.09).

{¶55} Therefore, we do not reach that portion of Home Services' third assignment of error insofar as it pertains to the calculation of the Brunkes' attorneys' fees, as this issue is not yet ripe for our review.[7]

III.

{¶56} Home Services' first assignment of error is sustained in part and overruled in part. Home Services' second assignment of error is overruled. Home Services' third assignment

[7] We make no judgment as to whether Home Services has properly preserved this argument.

of error is overruled in part, and we do not address this assignment of error to the extent that it pertains to the calculation of attorneys' fees, as this issue is not yet ripe for review. The judgment of the trial court is affirmed in part, and reversed in part. This cause is remanded to the trial court for further proceedings consistent with this decision.

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

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed equally to both parties.

CARLA MOORE
FOR THE COURT

HENSAL, P. J.
WHITMORE, J.
CONCUR.

APPEARANCES:

MICHAEL C. DEJOHN, Attorney at Law, for Appellant.

JACK MALICKI, Attorney at Law, for Appellee.