**THIS OPINION IS NOT INTENDED FOR PUBLICATION**

**UNITED STATES BANKRUPTCY COURT**
**NORTHERN DISTRICT OF OHIO**
**EASTERN DIVISION**

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| IN RE: | ) | CASE NO. 99-53831 |
| | ) | |
| THOMAS & KATHERINE CIATTI, | ) | CHAPTER 7 |
| | ) | |
| DEBTOR(S) | ) | |
| | ) | |
| MIA JOHNSON, | ) | **ADVERSARY NO. 00-5055** |
| | ) | |
| PLAINTIFF(S), | ) | JUDGE MARILYN SHEA-STONUM |
| | ) | |
| vs. | ) | |
| | ) | |
| THOMAS CIATTI | ) | |
| | ) | |
| DEFENDANT(S). | ) | **MEMORANDUM OPINION** |

This matter comes before the Court on plaintiff's complaint to determine the dischargeability of a debt pursuant to 11 U.S.C. §523(a)(6) and certain related state law causes of action. The Court held a trial in this matter[1] and appearing were Ronald Frederick, counsel for plaintiff and Ronald Chernek, counsel for defendant-debtor. During the trial, the Court received evidence in the form of exhibits and in the form of testimony from plaintiff and defendant-debtor. At the conclusion of the trial, the Court took the matter under advisement. Based upon testimony and evidence presented at the trial, the arguments of counsel, the pleadings in this adversary proceeding and defendant-debtor's main chapter 7 case and pursuant to Fed. R. Bankr. P. 7052, the Court makes the following

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[1] The joint trial of this matter and related adversary proceeding no. 00-5054 (*Karen McKenzie v. Thomas Ciatti*) was originally scheduled for October 2-3, 2000. On September 28, 2000, plaintiff filed a "Motion to Continue Trial Due to Medical Unavailability of Co-Plaintiff Karen McKinzie" **[docket #30]**. That motion was granted and the trial was re-scheduled for November 27, 2000. Karen McKinzie did not appear at the November 27th trial and given her failure to prosecute, the Court entered a judgment in favor of defendant-debtor and against Ms. McKinzie.

findings of fact and conclusions of law.

## I. FINDINGS OF FACT [2]

1. Defendant-debtor is the sole shareholder and sole director of C. Thomas Enterprises, Inc. which does business as CarSmart Autostore ("CarSmart"). Defendant-debtor is the president and sole officer of that company which does not have an outside board of directors.

2. CarSmart held no annual shareholders or board of directors meetings.

3. Defendant-debtor wielded complete control over the business operations of CarSmart and individually set all the significant policies and procedures of the company.

4. CarSmart ran advertisements in The Cleveland Plain Dealer newspaper stating that it had motor vehicles available for sale with $99.00 as a down payment (a "$99.00 Down Deal").

5. Based upon an ad she saw in The Cleveland Plain Dealer newspaper for a $99.00 Down Deal, plaintiff called CarSmart to inquire about purchasing an automobile. During that telephone call plaintiff spoke to Pat Petrella who took some information about her finances and then indicated that he would call her back to determine if she qualified for financing. Approximately ½ hour after their original conversation, Mr. Petrella telephoned plaintiff, indicated that she had qualified for a $99.00 Down Deal and requested that

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[2] Findings 1, 4, 9, 14, 15 and 19 are not disputed by plaintiff and defendant-debtor and are the subject of stipulations filed in this adversary proceeding on September 18, 2000 **[docket #17]** and on September 26, 2000 **[docket #21]**.

she visit a CarSmart dealership to view the cars available for purchase.

6. Thereafter, plaintiff visited the CarSmart dealership located in Shaker Heights, Ohio to view automobiles available for purchase for the $99.00 Down Deal. Because she was shown only one automobile that was not in very good condition, plaintiff left the CarSmart dealership without purchasing an automobile.

7. Approximately two weeks after plaintiff's first visit to the CarSmart dealership, a CarSmart employee named Scott Hustak telephoned plaintiff telling her of a newly arrived automobile.

8. Plaintiff returned to the CarSmart dealership in Shaker Heights and test drove a 1988 Chevrolet Nova with approximately 111,400 miles (the "Automobile").

9. On February 19, 1998, plaintiff entered into a "consumer transaction" (as that term is defined in Ohio Revised Code ("O.R.C.") §1345.01) with CarSmart to purchase the Automobile for a total purchase price of $2,742.30.

10. Plaintiff made a cash payment to CarSmart of $742.30, leaving a balance due on the Automobile of $2,000.00.

11. Plaintiff financed the outstanding balance through CarSmart. Pursuant to the terms of that financing, plaintiff was required to make 16 bi-monthly payments of $125.00 each with the first payment due on March 6, 1998.

12. On March 26, 1998, plaintiff, through counsel, sent CarSmart a letter indicating that she was revoking acceptance of the Automobile. Sometime shortly after receiving that letter, defendant-debtor ordered repossession of

the Automobile.

13. At the time of the repossession, plaintiff was behind by at least one payment of $125.00 due to CarSmart.

14. Plaintiff is a "consumer" as that term is defined in O.R.C. §1345.01.

15. CarSmart is a "supplier" as that term is defined in O.R.C. §1345.01.

16. Prior to his bankruptcy filing, plaintiff had commenced a civil suit against defendant-debtor in the Cuyahoga County Court of Common Pleas alleging, *inter alia*, violations of the Ohio Consumer Sales Practices Act. That case was styled *Mia Johnson v. Carsmart Autostore, Inc., et al.*, Case No. 355025 (the "State Court Case").

17. During the pendency of the State Court Case, plaintiff and defendant-debtor engaged in discovery.

18. Plaintiff never sought to remove the State Court Case to this Court and instead initiated the within adversary proceeding by filing a complaint captioned "Complaint to Determine Dischargeability of Debt."

19. Defendant-debtor and his wife, Katherine Ciatti,[3] filed a chapter 7 bankruptcy petition on December 16, 1999.

20. Listed on defendant-debtor's Schedule F - Creditors Holding Unsecured Nonpriority Claims was the pending State Court Case. Defendant-debtor listed the "amount of claim" in that case as $100,000.00 and also indicated that such claim was "disputed."

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[3] Katherine Ciatti was also named as a defendant in plaintiff's complaint but was dismissed from this adversary proceeding on August 14, 2000 **[docket #12]**.

## II. CAUSES OF ACTION AT ISSUE IN THIS ADVERSARY PROCEEDING

In her complaint, plaintiff asserted the following: "FIRST CLAIM FOR RELIEF - Various Violations of the Consumer Sales Practices Act ;" "SECOND CLAIM FOR RELIEF - Conversion;" "THIRD CLAIM FOR RELIEF - Punitive Damages;" and "FOURTH CLAIM FOR RELIEF - Personal Liability of Thomas Ciatti." *See* Complaint **[docket #1]**. The third "claim" for punitive damages and the fourth "claim" for personal liability are not independent causes of action but rather describe a form of relief that plaintiff seeks. In plaintiff's proposed findings of fact and conclusions of law, she alleges violations of Ohio's Odometer Rollback Act and a breach of warranty. *See* Plaintiff's Proposed Findings of Fact and Conclusions of Law at pages 22-23 **[docket #29]**. However, plaintiff never amended her complaint to add independent causes of action based upon those allegations. *Lewis v. ACB Business Servs., Inc.*, 135 F.3d 389, 405 (6th Cir. 1998) ("[A] complaint . . . must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory.") (citations omitted).

Although the caption is phrased "Complaint to Determine Dischargeability of Debt," plaintiff's complaint failed to set forth any specific cause of action under 11 U.S.C. §523(a). Pursuant to the initial pre-trial conference in this matter, the Court ordered that plaintiff's counsel file an amended pre-trial statement to specifically reference which Bankruptcy Code provisions he was relying upon for relief. **[Docket #6]**. In his amended pre-trial statement, the only Bankruptcy Code provision referred to by plaintiff's counsel

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[4] Despite being ordered to file this pleading by not later than May 31, 2000, plaintiff's

was 11 U.S.C. §523(a)(6). *See* Amended PreTrial Statement of Plaintiff Mia Johnson at unnumbered pages 1 and 8 **[docket #7]**.[4]

On September 26, 2000, which was only three business days before the originally scheduled trial of this matter (*see* footnote 1, *supra*), plaintiff filed a motion seeking to amend the relief sought in her complaint to also include a cause of action under §523(a)(2)(A) of the Bankruptcy Code. **[Docket #19]**. Pursuant to a status conference held in this matter on September 27, 2000 and an Order entered on October 3, 2000 **[docket #31]**, plaintiff's motion to amend her complaint was denied. At the conclusion of the trial plaintiff's counsel orally moved to again amend the complaint to include a cause of action pursuant to §523(a)(2)(A) claiming that such an amendment was necessary to conform the complaint to the evidence presented. Defendant-debtor objected to the oral motion contending that, because of this Court's October 3, 2000 Order denying plaintiff's original motion to amend her complaint, he did not present any evidence on or any defense to a cause of action based upon fraud.[5]

When issues not originally raised by a complaint "are tried by express or implied consent of the parties," Fed. R. Civ. P. 15(b) accords this Court discretion to permit the filing of an amended pleading to the extent necessary "to conform to the evidence" presented at trial. *Strickler v. Pfister Associated Growers, Inc.*, 319 F.2d 788, 791 6th Cir.

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amended pre-trial statement was not filed until June 2, 2000. Also, despite the specific requirement in Fed. R. Bankr. P. 7008(a) and Fed. R. Civ. P. 8(a) that a complaint initiating an adversary proceeding contain a *specific* reference to the grounds upon which the bankruptcy court's jurisdiction rests, plaintiff never amended her complaint in this regard.

[5] Section 523(a)(2)(A) of the Bankruptcy Code provides for the exception from discharge of debts "for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by . . . false pretenses, a false representation, or actual fraud . . . ."

1963). *See also* Fed. R. Bankr. P. 7015; Fed. R. Civ. P. 15(b). Defendant-debtor clearly did not express his consent to trial of an action pursuant to §523(a)(2)(A) of the Bankruptcy Code and "implied consent" requires considerable litigation of the matter: "[I]t must appear that the parties understood the evidence to be aimed at the unpleaded issue . . . [as] the rule does not exist simply to allow parties to change theories mid-stream." *Kovacevich v. Kent State University*, 224 F.3d 806, 831 (6th Cir. 2000) (citations omitted).

Although some of the evidence presented during the trial of this matter could, arguably, also support a cause of action under §523(a)(2)(A), there was not "considerable litigation" of a fraud claim. Moreover, plaintiff failed to explain in both her written and oral motions why she waited for so long to try to add a new cause of action to her complaint, especially given the fact that she was pursuing defendant-debtor in the State Court Case prior to his filing for bankruptcy.[6] Although delay alone will not automatically result in denial of a motion for leave to amend a complaint, when it is coupled with prejudice to the opposing party and a failure to demonstrate good cause for the delay, a motion to amend will be denied. *Deasy v. Hill*, 833 F.2d 38, 41 (4th Cir. 1987); *Head v. Timken Roller Bearing Co.*, 486 F.2d 870, 873-74 (6th Cir. 1973). *See also First Nat'l Bank of Louisville v. Master Auto Serv. Corp.*, 693 F.2d 308, 314 (4th Cir. 1982) (motion to amend properly

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[6] Plaintiff's written motion to amend her complaint was filed almost six months after the complaint initiating this adversary proceeding was filed and only three days before the originally scheduled trial of this matter. Although the complaint which initiated the State Court Case was not made a part of the record in this proceeding, a motion for sanctions filed by plaintiff on August 11, 2000 **[docket #11]** makes reference to a second set of interrogatories in the State Court Case that was served on defendant-debtor on or about March 25, 1999. Accordingly, the State Court Case would have been pending for at least 18 months when plaintiff's written motion to amend the complaint in this adversary proceeding was filed.

denied when made only 19 days before trial and where amendment was not the result of the discovery of new facts); *Woodson v. Fulton*, 614 F.2d 940, 942-43 (4th Cir. 1980) (denial of leave to amend upheld where plaintiff, who had been aware for some time of new claim, did not move to amend until immediately prior to trial).

Based upon the foregoing, the Court finds that plaintiff has properly raised only three causes of action in this adversary proceeding: (1) Various Violations of the Consumer Sales Practices Act; (2) Conversion; and (3) Dischargeability of a Debt pursuant to §523(a)(6) of the Bankruptcy Code. Each will be discussed, in turn, below.

## III. JURISDICTION OF THIS COURT

In her complaint, plaintiff asserts that the matters raised therein are "core" proceedings. *See* Complaint at ¶2 **[docket #1]**. To the extent that any of the matters raised in her complaint are determined not to be "core" proceedings, plaintiff consented to the jurisdiction of this Court to enter final judgment. *See* Complaint at ¶2 **[docket #1]**. Despite the requirements in Fed. R. Bankr. P. 7012(b), defendant-debtor's answer merely denied plaintiff's allegation of jurisdiction based upon a "want of knowledge" and failed to set forth whether or not he consented to this Court entering a final judgment in any "non-core" matters. *See* Answer at ¶2 **[docket #4]**.[7]

This adversary proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. In this adversary proceeding, plaintiff has asserted two causes of action (violations of Ohio's Consumer Sales Practices

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[7] Fed. R. Bankr. P. 7012(b) sets forth that "[a] responsive pleading shall admit or deny an allegation that the proceeding is core or non-core. If the response is that the proceeding is non-core, it *shall* include a statement that the party does or does not consent to entry of final orders or judgment by the bankruptcy judge. . . " (emphasis added).

Act and conversion) that are based solely upon state law and that arose prior to defendant-debtor's bankruptcy filing[8] and one cause of action (nondischargeability of a debt pursuant to §523(a)(6)) that is based solely upon federal bankruptcy law. The cause of action regarding nondischargeability is a "core" proceeding pursuant to 28 U.S.C. §157(b)(2)(A) and (I) over which this Court has jurisdiction pursuant to 28 U.S.C. §1334(b). Whether or not this Court has jurisdiction over plaintiff's two state law causes of action depends upon whether those matters are "related to" defendant-debtor's bankruptcy case.[9]

To fall within the jurisdiction of the bankruptcy court, a proceeding need only be "related to" a case under title 11. *See* 28 U.S.C. §1334(b).[10] A matter is related to a bankruptcy case if "the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy." *Michigan Employment Security Comm'n v. Wolverine Radio Company, Inc. (In re Wolverine Radio Co.),* 930 F.2d 1132, 1142 (6th Cir. 1991), quoting *Pacor, Inc. v. Higgins,* 743 F.2d 984, 994 (3rd Cir. 1984) (emphasis omitted). As noted by the Sixth Circuit, the key word in the test for determining jurisdiction is "conceivable." Certainty, or even likelihood, is not a requirement:

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8 Nowhere in her complaint did plaintiff assert either diversity or federal question jurisdiction as a basis for a federal court's determination of the causes of action premised upon conversion and violations of Ohio's Consumer Sales Practices Act.

9 Neither party to this adversary proceeding moved this Court for abstention pursuant to 28 U.S.C. §1334(c)(2).

10 That code provision sets forth that "[n]otwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in *or related to* cases under title 11." 28 U.S.C. §1334(b) (emphasis added).

"Bankruptcy jurisdiction will exist so long as it is possible that a proceeding may impact on 'the debtor's rights, liabilities, options, or freedom of action' or the 'handling and administration of the bankruptcy estate.'" *Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Provider of Connecticut (In re Dow Corning Corporation)*, 86 F.3d 482, 491 (6th Cir. 1996). *See also Kelley v. Nodine (In re Salem Mortgage Co.)*, 783 F.2d 626, 634 (6th Cir. 1986) (noting that "[a]lthough situations may arise where an extremely tenuous connection to the estate would not satisfy the jurisdictional requirement, . . . a broader interpretation of the [jurisdiction] statute more closely reflects the congressional intent in adopting the new bankruptcy laws").

For whatever reason, plaintiff did not seek relief from the automatic stay to pursue the State Court Case in the state court or remove the State Court Case to this Court.[11] Instead, plaintiff chose to file an adversary proceeding and assert actions against defendant-debtor. As of the filing of defendant-debtor's chapter 7 case, plaintiff held only a disputed and unliquidated claim as her state law causes of action against defendant-debtor were not reduced to judgment. For this Court to evaluate whether defendant-debtor's actions created a debt for "willful and malicious injury," it must first evaluate whether

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[11] 28 U.S.C. §1452 - Removal of Claims Related to Bankruptcy Cases, provides:

(a) A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

(b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order entered under this subsection remanding a claim or cause of action, or a decision to not remand, is not reviewable by appeal or otherwise by the court of appeals ....

defendant-debtor is in any way obligated to plaintiff through a violation of Ohio law. Accordingly, plaintiff's state law causes of action are "related to" defendant-debtor's bankruptcy case.

A bankruptcy court has jurisdiction to render final orders and judgments in "core" proceedings. *See* 28 U.S.C. §157(b). In otherwise "related to" proceedings, the bankruptcy court instead submits proposed findings of fact and conclusions of law to the district court unless the parties to the otherwise related proceeding consent to the bankruptcy court's jurisdiction to enter final orders and judgments. *See* 28 U.S.C. §157(c)(1) and (2). Despite defendant-debtor's failure to explicitly address this Court's jurisdiction, the allegation in his answer that he was without knowledge as to the truth of the assertion that all matters were core proceedings had the effect of generally denying his consent to this Court entering a final judgment as to the state law causes of action. *See Shea & Gould v. Red Apple Companies, Inc. (In re Shea & Gould)*, 198 B.R. 861, 864-65 (Bankr. S.D.N.Y. 1996). *See also M.S.V., Inc. v. Bank of Boston, Western Massachusetts, N.A. (In re M.S.V., Inc.)*, 97 B.R. 721 (D. Mass. 1989) (continuing to litigate proceeding after objecting to the proceeding as core or noncore does not constitute waiver of the objection). Accordingly, as to the causes of action for conversion and violation of the Ohio Consumer Sales Practices Act, the Court's Opinion will constitute findings of fact and conclusions of law that will be submitted to the district court for review.

## IV. DISCUSSION

As noted above, plaintiff must first demonstrate that defendant-debtor violated Ohio law before she can successfully prove that debtor owes her an obligation which should not be discharged in his chapter 7 bankruptcy filing.

### A. Conversion

Conversion is the wrongful control or exercise of dominion over property belonging to another which is inconsistent with or in denial of the rights of the owner. *Baltimore & Ohio Railroad Co. v. O'Donnell*, 32 N.E. 476, 49 Ohio St. 489 (Ohio 1892). In order to prove the tort of conversion, plaintiff must demonstrate: (1) that she owned or had a right to possess the Automobile at the time of the alleged conversion; (2) that defendant-debtor's alleged conversion was the result of a wrongful act or disposition of the Automobile; and (3) that she suffered damage as a result of the defendant-debtor's wrongful actions. *Tabar v. Charlie's Towing Serv., Inc.*, 646 N.E.2d 1132, 1136, 97 Ohio App. 3d 423, 427-28 (Ohio Ct. App. 1994).

It is undisputed in this case that plaintiff purchased the Automobile from CarSmart and that at the time the Automobile was repossessed, title to the vehicle was in plaintiff's name. Defendant-debtor contends that, due to plaintiff's failure to make payments on the Automobile, repossession was proper. Plaintiff contends that, because she properly revoked acceptance of the Automobile, repossession constituted conversion.

Section 1302.66 of the Ohio Revised Code addresses revocation of acceptance of goods and provides, in pertinent part, as follows:

> (A) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it:
>
> > (1) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or
> >
> > (2) without discovery of such nonconformity if his acceptance was reasonably induced either by the difficulty of the discovery before acceptance or by the seller's assurances.
>
> (B) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before

> any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.
>
> (C) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.

*See* O.R.C. §1302.66 (A), (B) and (C). Plaintiff testified that shortly after she purchased the Automobile she encountered numerous problems such as a spinning odometer, stalling, and the vehicle failing to reliably start. Plaintiff further testified that after she began encountering these problems, she telephoned CarSmart and was advised by Mr. Petrella that there was nothing the company could do to assist her. Thereafter, plaintiff took the Automobile to several repair shops for service and on March 26, 1998 plaintiff, through counsel, sent CarSmart a letter indicating that she was revoking acceptance of the vehicle. *See* Stipulated Exhibit #32.

Whether or not plaintiff properly revoked acceptance of the Automobile depends, in part, upon whether or not CarSmart had any obligation to cure the Automobile's alleged non-conformities. Pursuant to the documentary evidence presented at trial, plaintiff's purchase of the Automobile involved the execution of four documents: (1) a "Used Car Order" (*see* Stipulated Exhibit #27); (2) a "Retail Installment Contract and Security Agreement" (*see* Stipulated Exhibit #28); (3) a "Buyer's Guide" (*see* Stipulated Exhibit #29); and (4) a CarSmart statement of company policy (*see* Stipulated Exhibit #30). Because none of those documents contained an integration or merger clause and because neither party raised an argument to the contrary, all of these documents must be viewed together to determine the rights of the parties relative to the sale of the Automobile.

On the "Used Car Order," the line next to the statements "AS IS - NO WARRANTY. You will pay all costs for any repairs. The dealer assumes no responsibility

for any repairs regardless of any oral statements about the vehicle" is checked and plaintiff's signature appears on the line directly following those statements. *See* Stipulated Exhibit #27 (emphasis in the original). On the "Buyers Guide," a box next to this same "as is" language is marked with an "x" and plaintiff's signature appears directly above that information. *See* Stipulated Exhibit #28.[12] Plaintiff's signature also appears at the bottom of the CarSmart statement of company policy after information which sets forth, among other things, that "SOLD AS IS MEANS DEALER DOES NOT FIX ANYTHING FREE AFTER THE SALE." *See* Stipulated Exhibit #30 (emphasis in the original). The "Retail Installment Contract and Security Agreement," which is also signed by plaintiff, does not contain any "as is" language but does set forth that "[w]arranty information is provided to you separately." *See* Stipulated Exhibit #28 at page 2.[13]

Ohio Revised Code §1302.29(C)(1) governs the effect of warranty preclusion clauses such as the ones presented in the aforementioned documents and states, in part, that:

> [U]nless the circumstances indicate otherwise all implied warranties are excluded by expressions like "as is," "with all faults," or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; . . ."

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12 The "Buyers Guide"also included one half page of statements regarding warranty information and the box next to the beginning of that information was not marked. *See* Stipulated Exhibit #28.

13 The Retail Installment Contract and Security Agreement also provides that a non-payment constitutes a default. *See* Stipulated Exhibit #28 at page 2. That agreement further provides that one of CarSmart's remedies upon default is repossession of the Automobile. *See id.* At no point during the trial of this matter did plaintiff argue that, but for her alleged revocation of acceptance, the repossession of the Automobile was improper.

14 The implied warranties provided for by Ohio law are the implied warranty of merchantability (O.R.C. §1302.27) and the implied warranty of fitness for a particular

O.R.C. §1302.29(C)(1).[14] Thus, a clause such as "as is - no warranty" will vitiate all implied warranties "unless the circumstances indicate otherwise," such as when the parties understood the term to mean something other than a waiver of warranties. *Maritime Manuf., Inc. v. Hi-Skipper Marina*, 483 N.E.2d 144, 145, 19 Ohio St. 3d 93, 95 (Ohio 1985).

During the trial, plaintiff testified unequivocally that when she purchased the Automobile, she understood the meaning of the "as is - no warranty" language used in the "Used Car Order," the "Buyers Guide," and the CarSmart statement of company policy. Based upon such testimony, the Court finds that the circumstances do no otherwise indicate that those warranty exclusion clauses should not be given effect. Accordingly, plaintiff's purchase of the Automobile was without any implied warranties.

During the trial, plaintiff testified that when she first viewed the Automobile she noticed that it did not have a radio which prompted her to ask Mr. Hustak whether the vehicle had any other problems. Plaintiff testified that Mr. Hustak told her that the Automobile did not have other problems and that she could expect to drive the vehicle for "a long time." Plaintiff also testified that, while she was signing the purchase documents for the Automobile, Mr. Petrella told her that she was getting a "great" car. It was also plaintiff's testimony at trial that, because of these comments, she decided to purchase the Automobile. Accordingly, an issue is raised as to whether an express warranty was created concerning the condition of the Automobile and, if so, whether that express warranty was breached.

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purpose (O.R.C. §1302.28).

Express warranties are in addition to those implied by law and are created whenever an affirmation of fact or promise relating to the goods becomes part of the basis for the bargain between the parties. O.R.C. §1302.26.[15] *See also, Barksdale v. Van's Auto Sales, Inc.*, 577 N.E. 2d 426, 428, 62 Ohio App. 3d 724, 728 (Ohio Ct. App. 1989). The "basis of the bargain" test centers on the description or affirmation which goes to the heart of the basic assumption between the parties as distinguished from mere "puffing" or "sales talk" which do not act to create express warranties. *Leal v. Holtvogt*, 702 N.E.2d 1246, 1256, 123 Ohio App. 3d 51, 66 (Ohio Ct. App. 1998); *Barksdale v. Van's Auto Sales, Inc.*, 577 N.E. 2d 426, 428-29, 62 Ohio App. 3d 724, 728 (Ohio Ct. App. 1989).

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[15] Ohio Revised Code §1302.26 provides:

(A) Express warranties by the seller are created as follows:

(1) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(2) Any description of the goods which is made part of the basis of the bargain creates and express warranty that the goods shall conform to the description.

(3) Any sample or model which is made part of the basis of the bargain creates and express warranty that the whole of the goods shall conform to the sample or model.

(B) If is not necessary to the creation of an express warranty that the seller use formal words such as 'warrant' or 'guarantee' or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

A seller is entitled to "puff his goods as long as the salesmanship is done so on a part of his dealer's talk and is merely an expression of opinion." *Schwartz v. Gross*, 114 N.E.2d 103, 93 Ohio App. 445 (syllabus at ¶2) (Ohio Ct. App. 1952). Whether or not a statement is merely "puffing" or opinion turns upon the circumstances surrounding the sale, the reasonableness of the buyer in believing the seller, and the reliance placed on the seller's statement by the buyer. *Price Brothers Co. v. Philadelphia Gear Corp.*, 649 F.2d 416, 422 (6th Cir. 1981) (interpreting Ohio law); *Slyman v. Pickwick Farms*, 472 N.E.2d 380, 384, 15 Ohio App. 3d 25, 28 (Ohio Ct. App. 1984). *See also Society Nat'l Bank v. Pemberton*, 409 N.E.2d 1073, 1076, 63 Ohio Misc. 26, 29 (Ohio Mun. Ct. 1979) ("Express warranties rest on 'dickered' aspects of the individual bargain, and go so clearly to the essence of the bargain that words of disclaimer in a form are repugnant to the basic dickered terms.") (*citing* Official Comment to U.C.C. 2-313; O.R.C. §1302.26).

Plaintiff testified that she based her decision to purchase the Automobile upon Mr. Hustak's representation that she was getting "a great running car with no problems," combined with Mr. Petrella's representation that she was buying a "great" car. Aside from these generalized characterizations, plaintiff testified to only one specific reference to the Automobile's condition - - that of Mr. Hustak telling her the vehicle contained a "Toyota" engine.[16] However, plaintiff also testified that it was not this specific representation that she relied upon to make her purchase but rather the much more general statements about the overall quality of the Automobile. Such generalized statements are more characteristic of "puffing" and "sales talk" than statements which create an express warranty. *Compare*

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[16] Other than this reference to what Mr. Hustak had told her, plaintiff presented no evidence regarding the Automobile's engine.

*Motor Credit Center, Inc. v. Jordan*, 1996 WL 207683 (Ohio Ct. App. 1996) (holding that statements that an automobile was a "good car" and a "good choice" were "puffing" and did not create an express warranty); *Mims v. Flynn's Tire Co.*, 1991 WL 230034 (Ohio Ct. App. 1991) (holding that seller's statement that a truck's mechanical condition was "fine as far as he knew" combined with seller's mechanic's statement that the truck "ran fine" were merely matters of opinion that did not create an express warranty); *Jackson v. Krieger Ford, Inc.*, 1989 WL 29351 (Ohio Ct. App. 1989) (holding that statements such as a car "performed fine" and was "good on gas" were mere sales talk and did not create an express warranty) *with Novak v. Main Street Motors*, 1999 WL 529530 at *1 (Ohio Ct. App. 1999) (holding that an express warranty regarding an automobile's quality was created when the dealer made the combination of statements: "the vehicle was just traded-in;" the vehicle had only "one prior owner;" the vehicle was in "good condition;" "the vehicle was just checked over and serviced by . . . [a reputable local mechanic];" the dealer would "sell the vehicle to anyone in his own family;" and the dealer "drove the vehicle himself"); *Barksdale v. Van's Auto Sale, Inc.*, 577 N.E.2d 426, 62 Ohio App.3d 724 (Ohio Ct. App. 1989) (holding that seller's statement in direct response to buyer's inquiry about the condition of the transmission that there was nothing wrong and that all buyer had to do was get fluid and filter changed created an express warranty); *Society Nat'l Bank v. Pemberton*, 409 N.E.2d 1073, 63 Ohio Misc. 26 (Ohio Mun. Ct. 1979) (holding that statements by salesman who knew specific purpose for which buyer was purchasing truck that the truck would be "just right for plowing snow" went beyond mere sales talk and created an express warranty).

In addition to the fact that the statements at issue were more characteristic of "puffing" and "sales talk," the circumstances of the transaction at issue do not evince that

plaintiff was reasonable in relying upon the comments of Mr. Hustak and Mr. Petrella. Despite the fact that all automobiles (even new ones) may experience mechanical problems, plaintiff claims to have believed that a 10 year old vehicle which had been driven approximately 111,400 miles would not have problems and need repairs. The Automobile's "mature" condition, coupled with the fact that plaintiff affixed her signature next to an "as is" clause not once but three times, should have tempered plaintiff's overly optimistic belief that the Automobile would not suffer from mechanical problems.

Based upon the foregoing, the Court finds that plaintiff purchased the Automobile without any implied or express warranties and that CarSmart had no duty to repair the Automobile's mechanical problems. Because the Automobile suffered from "non-conformities" which CarSmart was not obligated to remedy, plaintiff's revocation of acceptance was ineffective. Moreover, because at the time the Automobile was repossessed, plaintiff was in default of her obligations to CarSmart by failing to make at least one bi-weekly payment, the repossession was proper and no conversion occurred.

**B. Various Violations of the Consumer Sales Practices Act**

As was previously noted, plaintiff did not seek relief from the automatic stay to pursue the State Court Case in the state court or remove the State Court Case to this Court. Moreover, plaintiff never provided this Court with any explanation as to the status of the State Court Case (i.e. whether that case has been stayed by defendant-debtor's bankruptcy filing, whether that case is proceeding as to non-debtor CarSmart, whether that case was dismissed and, if so, if the dismissal was with or without prejudice) and instead proceeded from the filing of the complaint through to the trial as if she wanted this Court to determine the underlying state law cause of action based upon, *inter alia*, violations of Ohio Consumer Sales Practices Act (the "OCSPA").

The OCSPA was enacted to prohibit unfair or deceptive acts or practices in connection with consumer transactions. *See* O.R.C. §1345.01 *et seq.* A violation of the OCSPA occurs:

> [W]here the act was an act or practice declared to be deceptive or unconscionable by rule adopted under division (B)(2) of section 1345.02 of the Revised Code before the transaction on which the action is based, or an act or practice determined by a court of this state to violate section 1345.02 or 1345.03 of the Revised Code and committed after the decision containing the determination has been made available for public inspection under division (A)(3) or section 1345.05 of the Revised Code . . . .

O.R.C. §1345.09(B). Section 1345.02 provides, in part, that the act or practice of a "supplier" in representing any of the following is deceptive:

> (1) That the subject of a consumer transaction has sponsorship, approval, performance characteristics, accessories, uses or benefits that it does not have;
>
> (2) That the subject of a consumer transaction is of a particular standard, quality, grade, style, prescription, or model, if it is not;
>
> * * *
>
> (8) That a specific price advantage exists if it does not;
>
> * * *
>
> (10) That a consumer transaction involves or does not involve a warranty, a disclaimer of warranties or other rights, remedies, or obligations if the representation is false.

O.R.C. §1345.02(B).

Through her complaint, plaintiff alleges that CarSmart violated the OCSPA by engaging in the following deceptive acts or practices:

> (1) Using a statement in the sales presentation which could create in the mind of a reasonable consumer a false impression as to the origin, prior use, value, quality, or features of the Automobile, and/or misrepresenting any

aspect of the vehicle;[17]
(2) Using a sales presentation which makes the material facts of the offer misleading or conveys or permits an erroneous impression as to the Automobile;[18]
(3) Misrepresenting the history or prior use of the Automobile;[19]

(4) Misrepresenting the quality and condition of the Automobile;[20]

(5) Misrepresenting the terms of the transaction;[21]

(6) Misrepresenting a warranty;[22]

(7) Failing to include in the written sales contract all material representations made prior to the agreement;[23]

(8) Representing that a specific price advantage existed when it did not;[24]

(9) Failing to have obtained title in its name prior to offering the Automobile for sale;[25]

(10) Failing to properly display the FTC Buyers Guide; [26]

(11) Failing to properly fill in the FTC Buyers Guide;[27]

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17 *See* Complaint at ¶16 **[docket #1]**.

18 *See* Complaint at ¶16 **[docket #1].**

19 *See* Complaint at ¶16 **[docket #1]**.

20 *See* Complaint at ¶16 **[docket #1]** and Plaintiff's Proposed Findings of Fact and Conclusions of Law at pages 19-20 **[docket #29]**.

21 *See* Complaint at ¶16 **[docket #1]**.

22 *See* Complaint at ¶16 **[docket #1]**.

23 *See* Complaint at ¶16 **[docket #1]** and Plaintiff's Proposed Findings of Fact and Conclusions of Law at page 20-21 **[docket #29]**.

24 *See* Complaint at ¶16 **[docket #1]**.

25 *See* Complaint at ¶16 **[docket #1]** and Plaintiff's Proposed Findings of Fact and Conclusions of Law at page 21 **[docket #29]**

26 *See* Complaint at ¶16 **[docket #1]** and Plaintiff's Proposed Findings of Fact and Conclusions of Law at page 18 **[docket #29]**;.

27 *See* Complaint at ¶16 **[docket #1]** and Plaintiff's Proposed Findings of Fact and Conclusions of Law at page 18-19 **[docket #29]**.

(12) Engaging in bait and switch advertising;[28]

(13) Failing to indicate whether the mileage of the vehicle is actual or estimated on the Used Car Order;[29] and

(14) Breaching a warranty.[30]

Where a "supplier" is found to have engaged in acts that were previously determined by a court ruling to violation O.R.C. §1345.02 or §1345.03, the "consumer" is entitled to recover damages pursuant to O.R.C. §1345.09(B).

***Failing to have obtained title in its name prior to offering the Automobile for sale*** **(No. 9, above):** Ohio's Motor Vehicle Dealer's Licensing Law prohibits an automobile dealer from selling a vehicle without first obtaining title. *See* O.R.C. §4505.19. During the trial of this matter defendant-debtor acknowledged that at the time the Automobile was sold to plaintiff, the certificate of title for that vehicle had not yet been transferred to CarSmart. Prior to the transaction at issue in this case, Ohio courts had determined that a failure to comply with O.R.C. §4505.19 constitutes a violation of the OCSPA. *See Fisher v. Gates*, 1995 WL 901458 at *1 (Ohio Ct. Common Pls. 1995); *Celebrezze v. Jerry Lear Ford, Inc.*, Case #88-360 (Ohio Ct. Common Pls. 1988). Accordingly, this Court finds that CarSmart violated the OCSPA by selling the Automobile to plaintiff without having first obtained its title and that plaintiff is the holder of a claim

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28 *See* Complaint at ¶16 **[docket #1]** and Plaintiff's Proposed Findings of Fact and Conclusions of Law at page 19 **[docket #29]**.

29 *See* Complaint at ¶16 **[docket #1]** and Plaintiff's Proposed Findings of Fact and Conclusions of Law at page 19 **[docket #29]**.

30 *See* Complaint at ¶16 **[docket #1]**.

31 Attached to plaintiff's proposed findings of fact and conclusions of law was the full text of the *Celebrezze v. Jerry Lear Ford, Inc.* decision and a copy of the Ohio Attorney

against the seller, CarSmart, for that violation pursuant to O.R.C. §1345.09.[31]

***Failing to properly display the "FTC Buyers Guide" and failing to properly fill in the "FTC Buyers Guide"*** **(Nos. 10 and 11, above):** Pursuant to 16 CFR 455, a dealer of used cars must display a "Buyers Guide" in the window of each vehicle at all times other than when the vehicle is being test driven. *See* FTC Commercial Practices Rule, 16 C.F.R. §455.2(a) (2001).[32] Pursuant to plaintiff's uncontradicted testimony, there was nothing displayed in the windows of the Automobile at any time while she was on the

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General's "Certificate of Availability of Public Inspection" regarding that decision. Plaintiff also purported to attach a copy of the decision in *Shabazz v. Term Auto Sales, Inc.*, Case No. 113734 (Ohio Common Pls. 1987) (which was also certified by the Ohio Attorney General for public inspection) however plaintiff left out pages 4 and 5 of that opinion. Because the Court tried but was unable to obtain the missing text of that opinion from Westlaw, Lexis and the Ohio Attorney General's website, that decision will not be relied upon or referenced any further in this Opinion.

[32] This provision of the Code of Federal Regulations sets forth, *inter alia*, the following:

> §455.2 Consumer sales – window form.
>
> (a) General duty. Before you offer a used vehicle for sale to a consumer, you must prepare, fill in as applicable and display on that vehicle a "Buyers Guide" as required by this rule.
>
> > (1) The Buyers Guide shall be displayed prominently and conspicuously in any location on a vehicle and in such a fashion that both sides are readily readable. You may remove the form temporarily from the vehicle during any test drive, but you must return it as soon as the test drive is over.
> >
> > * * *
>
> (e) Complaints. In the space provided, put the name and telephone number of the person who should be contacted if any complaints arise after sale.

CarSmart lot viewing the vehicle. Prior to plaintiff's purchase of the Automobile from CarSmart, the failure to properly display the "Buyers Guide" had been determined by Ohio Courts to be a violation of the OCSPA. *See Rubin v. Gallery Auto Sales*, 1997 WL 1068459 at *5 (Ohio Ct. Common Pls. 1997). Accordingly, this Court finds that CarSmart violated the OCSPA by its failure to property display the "Buyers Guide" in the Automobile and that plaintiff is the holder of a claim against the seller, CarSmart, for that violation pursuant to O.R.C. §1345.09.

Also pursuant to 16 CFR 455, a dealer of used cars is required to fill in the "Buyers Guide" so that it includes, *inter alia*, the name of a specific person to contact in the case of complaints. *See* FTC Commercial Practices Rule, 16 C.F.R. §455.2(e) (2001).[33] That information was not set forth on the "Buyers Guide" provided to plaintiff in connection with her purchase of the Automobile. *See* Stipulated Exhibit #29. This failure to properly fill out the "Buyers Guide" had also been determined by Ohio Courts to be a violation of the OCSPA prior to plaintiff's purchase of the Automobile. *See Rubin v. Gallery Auto Sales*, 1997 WL 1068459 at *5 (Ohio Ct. Common Pls. 1997). Accordingly, this Court finds that CarSmart violated the OCSPA by its failure to properly complete the "Buyers Guide" and that plaintiff is the holder of a claim against the seller, CarSmart, for that violation pursuant to O.R.C. §1345.09.

***Failing to indicate whether the mileage of the vehicle is actual or estimated on the "Used Car Order"* (No. 13, above):** Ohio Revised Code §4517.28 requires every sales contract for the purchase of a motor vehicle to include "the mileage appearing on the odometer of the vehicle at the time of sale and whether the mileage is accurate." In this

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[33] *See* footnote 32, *supra.*

particular case, the "Used Car Order" fails to even state the mileage of the Automobile. Although the Retail Installment Contract and Security Agreement does set forth that there are 111,400 miles on the Automobile and that such mileage is "accurate," the testimony elicited from defendant-debtor at trial demonstrated that, although close, this number was not the "actual" mileage on the Automobile. Prior to plaintiff's purchase of the Automobile, a failure to comply with the requirements of O.R.C. §4517.28 had been determined by Ohio Courts to be a violation of the OSCPA. *See Rubin v. Gallery Auto Sales*, 1997 WL 1068459 at *5 (Ohio Ct. Common Pls. 1997); *Celebrezze v. Jerry Lear Ford, Inc.*, Case #88-360 (Ohio Ct. Common Pls. 1988). Accordingly, this Court finds CarSmart violated the OCSPA by failing to set forth the Automobile's milage on the "Used Car Order" and that plaintiff is the holder of a claim against the seller, CarSmart, for that violation pursuant to O.R.C. §1345.09.

***Other alleged violations of the OCSPA*** **(Nos. 1 - 8 and 14, above):** Plaintiff has failed to demonstrate that any of the other alleged violations of the OSCPA occurred in relation to her purchase of the Automobile. As previously discussed, the representations about the Automobile that plaintiff claims to have relied upon did not create an express warranty and would not "create in the mind of a reasonable consumer a false impression as to the origin, prior use, value, quality or feature" of the Automobile. Nor did those representations "convey or permit an erroneous impression as to the Automobile." Moreover, plaintiff failed to produce evidence that CarSmart misrepresented the history or prior use of the Automobile or the terms of the transaction.[34] Finally, there was no showing that CarSmart represented that a specific price advantage existed when it did not

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[34] *See, e.g.,* footnote 16, *supra*.

or that CarSmart engaged in "bait and switch" advertising, especially in light of plaintiff's testimony that, when she received the telephone call from Mr. Hustak and then returned to the dealership to view the Automobile, she had ceased to expect to receive a $99.00 Down Deal.

***Damages for violation of the OCSPA*:** Section 1345.09(B) provides that a consumer may recover three times the amount of actual damages or two hundred dollars (whichever is greater) when, as in this case, the consumer has shown that (1) the act or practice has been determined by an Ohio court to violate O.R.C. §1345.02, or (2) the act or practice was committed after the decision containing the determination was made available for public inspection by the Ohio Attorney General pursuant to O.R.C. §1345.05(A)(3). *See* O.R.C. §1345.09(B). *See also Daniels v. True, d.b.a. Acme Heating and Constr.*, 547 N.E.2d 425, 428, 47 Ohio Misc. 2d 8, 10–11 (Ohio Mun. Ct. 1988).

During the trial of this matter, plaintiff's proofs focused primarily on the damage allegedly caused by the Automobile's mechanical failures. Plaintiff did not present any independent evidence to demonstrate what damages, if any, she suffered as a result of CarSmart's violations of the OCSPA. Accordingly, plaintiff is entitled to claim a total of $800.00 in damages, which constitutes the statutory maximum of $200.00 for each of CarSmart's violations.

**C. Dischargeability pursuant to §523(a)(6) of the Bankruptcy Code**

Through her complaint, plaintiff contends that defendant-debtor should be held personally liable for the actions of CarSmart and its employees. A fundamental rule of corporate law is that, normally, shareholders, officers and directors are not liable for the debts of a corporation. *Belvedere Condominium Unit Owner's Assoc. v. R.E. Roark Companies, Inc.*, 617 N.E.2d 1075, 1085, 67 Ohio St.3d 274, 287, (Ohio 1993). The

exception to this rule arises at equity to permit recovery of damages from a shareholder who dominates the corporation to the extent that the shareholder is, essentially, the "alter ego" of the corporation. *Id.*

In the case at bar, it is undisputed that defendant-debtor established the practices and completely dominated the operation of CarSmart. During trial, defendant-debtor testified that he never conducted the company's business as though it were a separate corporate entity. Based upon defendant-debtor's complete domination of CarSmart's operations, it would be unjust to allow him to hide behind the fiction of CarSmart's corporate identity to escape liability. Accordingly, defendant-debtor should be held personally liable for CarSmart's violations of the OCSPA. Having determined that defendant-debtor should be held liable, the next issue that must be addressed is whether or not that liability should be discharged in his chapter 7 case.

Section 523(a)(6) of the Bankruptcy Code provides that a discharge under §727 does not discharge an individual debtor from any debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." It is plaintiff's burden to prove all necessary elements of §523(a)(6) by a preponderance of the evidence, *Grogan v. Garner,* 498 U.S. 279, 291 (1991); *Barclays/American Business Credit, Inc. v. Adams (In re Adams),* 31 F.3d 389, 394 (6th Cir. 1994), and exceptions to discharge are to be strictly construed in defendant-debtor's favor. *Mfr. Hanover Trust Co. v. Ward (In re Ward),* 857 F.2d 1082, 1083 (6th Cir. 1988), *citing Gleason v. Thaw,* 236 U.S. 558, 562 (1915) (other citations omitted).

Plaintiff asserts that, merely because there was a violation of the OSCPA, the damages flowing from that violation are attributable to "willful" and "malicious" conduct:

> To recover for willfully and maliciously [sic] conduct the creditor much [sic] prove that the debtor acted both willful [sic] and malicious [sic]. It is well

> established that the foregoing standard for malic [sic] is clearly met when a person knowingly violates the law. . . . Furthermore, since knowledge of the law is assumed, any violation of the law is presumed malicious for purposes of 11 U.S.C. §523(a)(6), regardless of the subjective knowledge of the actor.

*See* Plaintiff's Proposed Findings of Fact and Conclusions of Law at pages 15-16 **[docket #29]** (*citing Grange Mutual Casualty Co. v. Chapman (In re Chapman)*, 228 B.R. 899, 909-10 (Bankr. N.D. Ohio 1998)) (other citations omitted). That assertion is far too broad, however, as it fails to recognize that "willfulness" and "maliciousness" are two distinct elements of §523(a)(6) which plaintiff must separately prove. *Fischer v. Scarborough (In re Scarborough)*, 171 F.3d 638, 641 (8th Cir. 1999), *cert. denied*, 528 U.S. 931 (1999).

Even assuming that "any violation of the law is . . . malicious for purposes of 11 U.S.C. §523(a)(6)," the evidence presented in this case does not demonstrate that all of the proved violations of the OCSPA were attributable to "willful" conduct by defendant-debtor. *See Kawaauhau v. Geiger*, 523 U.S. 57, 61 at n.3 (1998) (*citing* Black's Law Dictionary 1434 (5th ed. 1979) which defines "willfullness" as "voluntary" and "intentional"). Prior to the repossession of the Automobile, plaintiff's only contact with CarSmart was through Mr. Petrella and Mr. Hustak. An employer will be held liable for the acts of his employees only when such acts were done in the execution of the employer's business and within the scope of the agent's employment. *Finley v. Schuett*, 455 N.E.2d 1324, 1325, 8 Ohio App. 3d 38, 39 (Ohio Ct. App. 1982). "There is no presumption that the wrongful act of the agent was the act of the principal; authority to do the act must be demonstrated, or ratification of the act by the principal shown." *Id.*

During the trial, the only evidence presented regarding defendant-debtor's

knowledge of CarSmart's violation of the OCSPA was defendant-debtor's testimony that CarSmart routinely sold automobiles before it had received title to the vehicles. As for the other proved violations of the OCSPA, plaintiff presented no evidence to prove that they occurred because of an established company policy which the CarSmart employees she was dealing with were following. Although the Court suspects that, because of his control over CarSmart, defendant-debtor did have knowledge of the violations of Ohio law, it was plaintiff's burden to prove such knowledge and she failed in that regard.

## V. CONCLUSION

Based upon the foregoing, the Court finds that plaintiff has failed to prove that defendant-debtor converted the Automobile when it was repossessed. The Court further finds that plaintiff proved four violations of the OCSPA [(1) failure to obtain title to the Automobile prior to sale to plaintiff; (2) failure to properly display the "FTC Buyers Guide;" (3) failure to properly complete the "FTC Buyers Guide;" and (4) failure to indicate whether the Automobile's milage was actual or estimated on the "Used Car Order"] for which statutory damages in the amount of $200.00 for each violation should be assessed. However, the Court also finds that of those four violations, plaintiff only proved that one [failure to obtain title to the Automobile prior to sale to plaintiff] was due to defendant-debtor's "willful" and "malicious" conduct. Accordingly, only $200.00 of the total $800.00 in liability should be excepted from defendant-debtor's discharge. As to the two non-core matters addressed in this Opinion, the Court will prepare a and file a separate document (which will incorporate this Opinion by reference) to submit to the District Court for its review.

**IT IS SO ORDERED.**

**THIS OPINION IS NOT INTENDED FOR PUBLICATION**

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MARILYN SHEA-STONUM
Bankruptcy Judge

**DATED: 3/13/01**