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Court of Common Pleas
Clermont County, Ohio

Mike Castrucci Ford Sales, Inc.	:	
Plaintiff	:	**Case No. 99 CVH 333**
vs.	:	**Decision**
George Krull	:	
Defendant	:	

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I. Factual Background

Mike Castrucci Ford Sales, Inc. ("plaintiff") filed a complaint seeking declaratory relief on an oral contract. George A. Krull ("defendant") responded and made numerous counterclaims. Currently before the Court is plaintiff's motion for summary judgment on the defendant's counterclaims. The parties filed depositions, and the defendant submitted an affidavit.[1] Having considered the parties arguments, and all relevant evidence, the plaintiff's motion is granted in part

[1] This has not been considered. Plaintiff moved to strike this affidavit, and the defendant did not counter. After deliberating upon the plaintiff's arguments, this affidavit is struck.

and denied in part.

Plaintiff is a dealer of motor vehicles, to whom the defendant went to look for a new truck. According to the defendant, he intended to purchase a new 1998 Ford pick-up truck, and plaintiff supposedly offered to sell one to the defendant for $19,000. The plaintiff allegedly agreed to credit the defendant for a trade-in of his 1985 GMC pick-up truck, and defendant made a down payment.

For some reason, the "sale" was drawn up on a "lease" form. According to Mr. Krull's deposition testimony:

> He [*i.e.*, Rick Stetson, the salesman] started filling out paper. He had paper in front of him on the table there, he was writing on, and I looked over upside down and I see it says lease agreement, and I said, "hey Rick, this ain't no damn lease agreement, I want to buy the dang thing." And he said, "Oh, that's all right. We do all our lease — all our sales on lease agreements." I said "What?" And he said, "Yeah, it will work out all right."

Sometime after this occurred, Mr. Krull was led alone to a "little cubby hole office that looked like a jail cell, a little dingy dungeon[.]" There was "a little bit of overhead light" though it was "real dull and dark." Some man, who was in this office, "started shoving papers at me and said, sign here, here, here and here, never explaining anything." When asked what he was signing, the man told Mr. Krull that it was "the sales agreement, * * * the odometer reading and different things like this that you normally sign when you buy new vehicle." After this, Mr. Stetson said: "you got a good buy."

When the defendant later realized that he had actually leased the vehicle, instead of having purchased it, he telephoned the plaintiff and asked to have the lease canceled, his money returned, and other expenses paid for. Defendant allegedly accepted this offer. This "offer" and "acceptance," the plaintiff alleges, constitutes a binding oral contract between the parties. According to the plaintiff, the defendant has not lived up to his part of the bargain. Therefore, the plaintiff commenced an action

seeking declaratory relief under the above alleged oral agreement.

The defendant counterclaimed, asserting that he was fraudulently induced[2] to sign the lease contract, that the plaintiff violated the Consumer Sales Practices Act ("CSPA"), and he sought punitive damages. Also, the defendant made a counterclaim for conversion.

II. Standard of Review

The motion currently before the Court is one for summary judgment. Pursuant to Civ.R. 56(A) and (B), either party to a lawsuit may make a motion for summary judgment. A party that moves for summary judgment "bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims." *Dresher v. Burt* (1996), 75 Ohio St.3d 280, at 293, 662 N.E.2d 264, at 274. Once this burden is met, the nonmoving party may not rest on mere assertions, but instead must produce evidence showing a genuine issue of fact on any issue for which that party bears the burden of production at trial. *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, 570 N.E.2d 1095, paragraph three of the syllabus. In determining whether there is a question of fact precluding summary judgment, the Court must view the record and draw all inferences in the light most favorable to the nonmoving party. *Turner v. Turner* (1993), 67 Ohio St.3d 337, at 341, 617 N.E.2d 1123, at 1127.

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[2] Fraud in the inducement "occur[s] when a misrepresentation leads another to enter into a transaction with a false impression of the risks, duties, or obligations involved[.]" Black's Law Dictionary (7 Ed. 1999) 671. Such should be contrasted with "fraud in the execution," which is also known as "fraud in the factum." See *St. Louis & San Francisco Ry. Co.* (C.A.5 1894), 60 F. 880, at 882 (discussing this type of fraud). See, also, *Equitable Life Assurance Soc. of the United States v. Johnson* (C.A.6 1936), 81 F.2d 543, at 546 (stating that an individual may always introduce parol evidence to establish fraud in the execution). Additionally, the claimed fraud is "factual," as opposed to "promissory." 37 Corpus Juris Secundum (1997), Fraud, Sections 10, 14.

III. Legal Analysis

In its motion for summary judgment, the plaintiff argues: (1) the defendant's counterclaims for common law fraud, and for deceptive sales practices under the CSPA, are precluded by the parol evidence rule; (2) if the defendant's common law fraud counterclaim is not barred by the parol evidence rule, he nevertheless could not have justifiably relied on the plaintiff's representations; (3) the defendant has not stated a counterclaim for conversion; and (4) because the defendant's substantive counterclaims should be dismissed, so too should the counterclaim for punitive damages. The defendant, in opposition, argues: (1) the parol evidence rule does not bar either his common law fraud or CSPA counterclaims; (2) with respect to common law fraud, justifiable reliance is a question of fact that must be determined by the trier of fact; and (3) since his substantive counterclaims survive, so too must his counterclaim for punitive damages.

At oral argument, the defendant informed the Court that he no longer wishes to pursue his counterclaim for conversion. The Court finds it appropriate to grant summary judgment as to this counterclaim. However, summary judgment is denied as to the defendant's remaining counterclaims.

A. Consumer Sales Practices Act and the Parol Evidence Rule

During the 1960s and 1970s, a vast array of consumer protection statutes were promulgated. See Pridgen, Consumer Protection and the Law (1999) 3-5 to 3-8, Section 3.02(2). The CSPA (R.C. 1345.01 *et seq.*), which was modeled after the Uniform Consumer Sales Practices Act, is one such statute. See 7A Uniform Laws Annotated Part I (1999) 206. This is a remedial law, intended to compensate for "inadequacies of traditional consumer remedies[.]" Roberts & Martz, Consumerism Comes of Age: Treble Damages and Attorneys Fees in Consumer Transactions — The Ohio Consumer Sales Practices Act (1981), 42 Ohio St. L.J. 927, at 928.

The question herein is whether the parol evidence rule plays any role in CSPA cases. This Court is only aware of two Ohio cases, which have reached conflicting results, that address this issue. Compare *Calixte v. Toyota of Cincinnati Co.* (Dec. 9, 1992), Hamilton App. No. C-910774, *unreported*, 1992 WL 361906, at **1 (summarily stating that the parol evidence rule applies), with *Doody v. Worthington* (Apr. 10, 1991), Franklin Cty. M.C. No. M 9011CVI-37581, *unreported*, 1991 WL 757571, at **3 (parol evidence rule does not apply). According to a respected treatise in this area, the parol evidence rule clearly should *not* apply to a claim brought pursuant to a consumer protection statute, such as the CSPA. Unfair and Deceptive Acts and Practices (4 Ed.Sheldon & Carter Eds.1997) 160, Section 4.2.15.

An action brought under the CSPA is neither wholly tortious nor contractual in nature; rather, as a creature of statute, it is *sui generis*. *Slaney v. Westwood Auto, Inc.* (1975), 366 Mass. 688, at 704, 322 N.E.2d 768, at 779. Because of this, cases brought under the CSPA should "not [be] governed by common law contract principles or the particularized evidentiary rules which attend them." *Love v. Keith* (1989), 95 N.C.App. 549, at 553, 383 S.E.2d 674, at 677, overruled in part on other grounds by *Custom Molders, Inc. v. American Yard Prods., Inc.* (1995), 342 N.C. 133, at 140, 463 S.C.2d 199, at 203 (citations omitted). Indeed, the Supreme Court of Texas, in *Weitzel v. Barnes* (Tex.1985), 691 S.W.2d 598, at 599-600, squarely addressed the issue, in the context of the Texas Deceptive Trade Practices Act ("DTPA"), and held that the parol evidence rule did not apply. As elucidated by a later Texas appellate court:

> The Supreme Court reasoned that the justifications for the parol evidence rule do not apply in deceptive trade practices cases where the consumer sues on the basis of pre-contractual representations because the consumer's recovery is not dependent upon the alteration or contradiction of a contract but rather upon conduct which was itself actionable under the DTPA without regard to the obligations imposed on the

parties by the contract.

> In other words, the [S]upreme [C]ourt recognized that contractual liability under the DTPA derive from two different sources. Contractual liability turns solely on the agreement of the parties whereas liability under the DTPA springs from the statute. As a general proposition, liability under the DTPA is neither increased nor diminished by the presence of a formal written contract covering the identical subject matter.
>
> Unlike contractual liability, resulting from the voluntary agreement of the parties, liability for false, misleading and deceptive acts is provided by the legislature for the breach of a duty imposed by it. These duties cannot be altered by the agreement of the parties. To apply the parol evidence rule in DTPA cases would frustrate the legislature's purpose in passing the statute without furthering the objectives of the parol evidence rule. As the [S]upreme [C]ourt succinctly announced in *Weitzel*, "traditional contractual notions do not apply" when the consumer seeks recovery for the breach of a duty imposed by the DTPA. * * *

Honeywell, Inc. v. Imperial Condominium Assn., Inc. (Tex.App.1986), 716 S.W.2d 75, at 78 (citations omitted). Later Texas courts have approvingly cited their Supreme Court's opinion in *Weitzel*, following its legal pronouncement. See, *e.g.*, *Downs v. Seaton* (Tex.App.1993), 864 S.W.2d 553, at 555; *Brown Found. Repair & Consulting, Inc. v. McGuire* (Tex.App.1986), 711 S.W.2d 349, at 351. See, also, *Torrance v. AS & L Motors, Ltd.* (1995), 119 N.C.App. 552, at 554-55, 459 S.E.2d 67, at 69, review denied (1995), 341 N.C. 424, 461 S.E.2d 768. But, see, *Vezina v. Nautilus Pools, Inc.* (1992), 27 Conn.App. 810 at 814, 610 A.2d 1312, at 1315 ("Only where the representations are deemed to be material by the trial court, and the remaining requirements for the admission of parol evidence have been satisfied, will such evidence be admitted.").

With all due respect to the First District Court of Appeals, this Court declines to follow *Calixte* and adopts the prevailing rule, which is set forth in *Weitzel*. As stated in *Teague v. Rowton* (1987), 84 Or.App. 72, at 77-78, 733 P.2d 93, at 96, "[i]t would be absurd to disallow as proof of an unlawful trade practice evidence of the very precontractual oral misrepresentations on which the claim is based." Thus, the plaintiff's motion for summary judgment is denied on this point.

B. Common Law Fraud and the Parol Evidence Rule

Before starting upon our journey through the winding road to come, this Court first expresses doubt that the parol evidence rule, which is a matter of substantive contract law, should play any role in a tort action grounded in active fraud. The Supreme Court of Alabama, in *Dixon v. Southtrust Bank of Dothan, N.A.* (1991), 574 So.2d 706, at 708 (citation omitted), stated that "the parol evidence rule applies to actions in contract and not actions in tort[.]" Accord *Marshall v. Keaveny* (1978), 38 N.C.App. 644, at 647, 248 S.E.2d 750, at 753. In a tort action for fraud, such as the one *sub judice*, the complaining party is not attempting to vary or contradict the contract. Rather, the complainant seeks compensation for injuries suffered because he or she was fraudulently induced to enter into the contract. The contract remains in full force and effect, no portion of it is challenged.[3]

Generally speaking, the main reason we have the parol evidence rule is that it "gives effect to the intention of the parties that is evident on the face of the original contract." *American Gen. Fin. v. Beemer* (1991), 73 Ohio App.3d 684, at 688, 598 N.E.2d 144, at 146. By employing the rule, courts hope to reduce the potential for litigation regarding the scope and meaning of contracts. 11 Williston, Contracts (4 Ed.Lord Ed.1999) 548-550, Section 33.1. Neither the stability of contract law, nor the integrity given to contracts by the parol evidence rule, is compromised where the contract — *as written* — continues in force, and the disgruntled party sues for damages in fraud. Thus, at least in this context, the parol evidence rule should have no role. As stated by the Alabama Supreme Court in *Dixon*: "[T]he victim of fraud should not be denied redress simply because he

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[3] An individual that is fraudulently induced to enter into a contract may avoid the contract and recover monies paid, or such person may affirm the contract and sue for damages in tort. See, *e.g.*, *Cross v. Ledford* (1954), 161 Ohio St. 469, at 475, 53 O.O. 361, at 363, 120 N.E.2d 118, at 122; *Reinhart v. Wells* (1868), Dayton 298, at 299.

justifiably relied upon the representations of someone who turned out to be misrepresenting the facts." *Id.* at 709. But for the fact that Ohio appellate courts have allowed litigants to assert the parol evidence rule in non-contract based cases, this Court would adopt the above quoted rule of law from *Dixon*.

Having made this preliminary point, we turn to consider the present state of Ohio law. A good place to begin our analysis is with a brief recitation of the parol evidence rule. A traditional statement of the parol evidence rule is found in the Restatement of the Law 2d, Contracts (1981) 129, Section 213:

> (1) A binding integrated agreement discharges prior agreements to the extent that it is inconsistent with them.
> (2) A binding completely integrated agreement discharges prior agreements to the extent that they are within its scope.
> (3) An integrated agreement that is not binding or that is voidable and avoided does not discharge a prior agreement. But an integrated agreement, even though not binding, may be effective to render inoperative a term which would have been part of the agreement if it had not been integrated.

The parol evidence rule has been codified in the context of sales and leases of goods. See R.C. 1302.05, 1310.09. With leases, such as the one herein, the Revised Code provides:

> Terms with respect to which the confirmatory memoranda of the parties agree or that otherwise are set forth in a writing intended by the parties as a final expression of their agreement with respect to the terms that are included in their agreement may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented by both of the following:
>
> (A) Course of dealing, usage of trade, or course of performance;
>
> (B) Evidence of consistent additional terms, unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

Id. 1310.09. Simply stated, where parties enter into an integrated written contract, which is intended to memorialize their final agreement, prior negotiations, writings, etc., may not be introduced to contradict those things expressly provided for in the contract. See, *e.g.*, *Babcock v. May* (1831), 4

Ohio 334, at 347; *Johnson v. Shrieves* (App.1935), 20 Ohio Law Abs. 306, at 308; *Golner v. Lawrence* (App.1923), 1 Ohio Law Abs. 314, at 314.

Nonetheless, a judge-made "fraud exception" exists to the parol evidence rule.[4] See, *e.g.*, 1 Alperin & Chase, Consumer Law (1986), Sections 20, 21; 3 Corbin, Contracts (1960), Section 580; Dobbs, The Law of Torts (2000), Section 482; 2 Harper et al., The Law of Torts (1986), Sections 7.4, 7.10; 3A Hawkland & Miller, Uniform Commercial Code Series (1993), Section 2A-202.02; 3 Jones, Evidence (6 Ed.Gard Rev.1972), Section 16.2; Prosser & Keeton, The Law of Torts (5 Ed.Keeton Ed.1984), Section 109; 1 White & Summers, Uniform Commercial Code (4 Ed. 1995), Section 2.11; 9 Wigmore, Evidence (Chadbourn Rev.1981), Section 2439(a); Williston, *supra*, Section 33.17. See, also, 37 American Jurisprudence 2d (1968), Fraud and Deceit, Section 451; 32A Corpus Juris Secundum (1996), Evidence, Section 1235; Annotation, Application of Parol Evidence Rule of UCC § 2-202 Where Fraud or Misrepresentation is Claimed in Sale of Goods (1976), 71 A.L.R.3d 1059. Because the parol evidence rule is a matter of contract law, this exception is typically asserted where a party sues in contract for recission and restitution. The Restatement provides:

> *Agreements and negotiations prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish*
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> (a) that the writing is or is not an integrated agreement;
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> (b) that the integrated agreement, if any, is completely or partially integrated;
>
> (c) the meaning of the writing, whether or not integrated;
>
> (d) *illegality, fraud, duress, mistake, lack of consideration, or other invalidating cause*;
>
> (e) ground for granting or denying recission, reformation, specific performance, or other remedy.

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[4] Technically, when asserted in contracts cases, it is not an "exception." Rather, the parol evidence rule simply does not apply. See Shanker, Judicial Misuses of the Word Fraud to Defeat the Parol Evidence Rule and the Statute of Frauds (With Some Cheers and Jeers for the Ohio Supreme Court) (1989), 23 Akron L.Rev. 1, at 3-4.

Restatement, *supra*, at 132-33, Section 214 (emphasis added). There are substantial policy reasons underlying the fraud exception.

> A principal purpose of the parol evidence rule is to guard writings against too easy fabrication of oral testimony. The rule does this by drawing a more or less hard and fast line that will exclude honest as well as fraudulent testimony. Because it does so it can be used as a vehicle for fraud and oppression — particularly of the legally unsophisticated. And a rule that would prevent the showing of actual dishonesty would allow the drafter of the instrument to create a built-in protection for his own fraudulent overreaching.

Harper et al., *supra*, at 398 fn.8, Section 7.4.

Not surprisingly, Ohio has adopted this "exception." See, *e.g.*, *Walters v. First Natl. Bank of Newark* (1982), 69 Ohio St.2d 677, at 681, 23 O.O.3d 547, at 549, 433 N.E.2d 608, at 611 (per curiam); *Spencer v. Huff* (July 2, 1998), Scioto App. No. 97CA2543, *unreported*, 1998 WL 391948, at **3; *Dlouhy v. Frymier* (1993), 92 Ohio App.3d 156, at 160, 634 N.E.2d 649, at 652, motion to certify record overruled (1994), 68 Ohio St.3d 1436, 625 N.E.2d 624; *Ohio Sav. Bank v. H.L. Vokes Co.* (1989), 54 Ohio App.3d 68, at 70, 560 N.E.2d 1328, at 1331; *Stegawski v. Cleveland Anesthesia Group, Inc.* (1987), 37 Ohio App.3d 78, at 84, 523 N.E.2d 902, at 908-09; *Finomore v. Epstein* (1984), 18 Ohio App.3d 88, at 89, 18 OBR 403, at 405, 481 N.E.2d 1193, at 1195; *BancOhio Natl. Bank v. Coleman* (1984), Cuyahoga App. No. 48108, *unreported*, 1984 WL 3630, at **4; *Sabins v. Miller* (Jan. 8, 1981), Madison App. No. 711, *unreported*, 1981 WL 5040, at **4 (per curiam); *Zydel v. Clarkson* (1928), 29 Ohio App. 382, at 385, 6 Ohio Law Abs. 108, at 108, 163 N.E. 584, at 584. See, also, *Clarke Assoc., Inc. v. River Downs, Inc.* (July 27, 1983), Hamilton App. No. C-820768, *unreported*, 1983 WL 5147, at ** 5, citing Restatement, *supra*, at 132-33, Section 214.

Even so, the plaintiff avers that there is an "exception to the fraud exception." Ultimately,

the plaintiff's argument rests upon two decisions.[5] The first decision is *Busler v. D & H Mfg., Inc.* (1992), 81 Ohio App.3d 385, at 390-91, 611 N.E.2d 352, at 355-56, jurisdictional motion overruled (1992), 65 Ohio St.3d 1444, 600 N.E.2d 686 (emphasis added), wherein the Tenth District Court of Appeals stated:

> If contracting parties integrate their negotiations and promises into an unambiguous, final, written agreement, then evidence of prior or contemporaneous negotiations, understandings, promises, representations, or the like pertaining to the terms of the final agreement are generally excluded from consideration by the court. [*Charles A. Burton, Inc. v. Durkee* (1952), 158 Ohio St. 313, 49 O.O. 174, 109 N.E.2d 265,] paragraph two of the syllabus; *Yoder v. Columbus & S. Elec. Co.* (1974), 39 Ohio App.2d 113, 68 O.O.2d 288, 316 N.E.2d 477. This rule is not confined to excluding merely parol communications; it excludes contrary written communications as well.
>
> Notwithstanding, many Ohio cases have held that a party may offer evidence of prior or contemporaneous representations to prove fraud in the execution or inducement of an agreement. See, *e.g.*, *Stegawski v. Cleveland Anesthesia Group, Inc.* (1987), 37 Ohio App.3d 78, 84, 523 N.E.2d 902, 908. Indeed, without such evidence it would be difficult if not impossible to prove fraud. However, it is important to realize that the law has not allowed parties to prove fraud by claiming that the inducement to enter into an agreement was a promise within the scope of the integrated agreement but which was not ultimately included in it. *Id.* at 84, 523 N.E.2d at 908; *AmeriTrust Co. v. Murray* (1984), 20 Ohio App.3d 333, 335, 20 OBR 436, 438, 486 N.E.2d 180, 183. *Hence, if there is a binding and integrated agreement, then evidence of prior or contemporaneous representations is not admissible to contradict the unambiguous, express terms of the writing.* [1] Restatement [of the Law 2d, Contracts (1981)] 136, Section 215.

The second decision, which was written by the Eighth District Court of Appeals, is *AmeriTrust Co. v. Murray* (1984), 20 Ohio App.3d 333, at 335, 20 OBR 436, at 438, 480 N.E.2d 180, at 183 (second emphasis added):

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[5] The plaintiff also cites statute of fraud cases, such as *Marion Prod. Credit Assn. v. Cochran* (1988), 40 Ohio St.3d 265, 533 N.E.2d 325, paragraph three of the syllabus, and *Star Bank, N.A. v. George Miller Constr. Co., Inc.* (June 22, 1992), Butler App. No. CA91-11-195, *unreported*, 1992 WL 139369, at **3, quoting *Marion Prod. Credit Assn.*, *supra*, and a promissory estoppel/negligent misrepresentation case, *Ed Schory & Sons, Inc. v. Society Natl. Bank* (1996), 75 Ohio St.3d 433, at 439-41, 662 N.E.2d 1074, at 1080-81. The factual and legal scenarios addressed in these cases are not before this Court. Thus, these cases are not controlling.

> "* * * A party may * * * proffer evidence of a contemporaneous oral agreement when the agreement was made in order to induce a party to enter into a written contract. * * *" *Walters v. First Nat[l.] Bank of Newark* (1982), 69 Ohio St.2d 677, 681, [23 O.O.3d 547,] 433 N.E.2d 608. However, "* * * the parol evidence rule precludes the introduction of evidence of conversations or declarations *which occur prior to or contemporaneous with a written contract and which attempt to vary or contradict terms contained in the writing* * * *." (Emphasis added.) *Gerwin v. Clark* (1977), 50 Ohio App.2d 331, 332-333, [4 O.O.3d 283,] 363 N.E.2d 602. See, also, *Neil v. Bd. of Trustees of the Ohio Agricultural & Mechanical College* (1876), 31 Ohio St. 15 (a case which specifically held that a guarantor cannot introduce parol evidence to vary the terms of a written guaranty instrument). *Thus, appellant cannot argue that he was the victim of fraud and misrepresentation when the terms of the written guaranty, which he signed, specifically refute that argument.*

Busler was a case wherein the plaintiff-appellant sought recission, restitution, and money damages. 81 Ohio App.3d at 388, 611 N.E.2d at 354. In *AmeriTrust Co.* the defendant- appellant sought relief from judgment, under Civ.R. 60(B). 20 Ohio App.3d at 334, 20 OBR at 437, 486 N.E.2d at 182.

Citing the above two cases, and/or cases that cite to them, our appellate courts have summarily concluded that an exception exists to the fraud exception; *viz.*, the fraud exception does not apply — in many circumstances — where evidence of fraud is at variance with (*i.e.*, it contradicts) the written contract. See, *e.g.*, *J.A. Industries, Inc. v. All Am. Plastics, Inc.* (1999), 133 Ohio App.3d 76, at 88, 726 N.E.2d 1066, at 1074, citing *Busler*, *supra*, and *Paragon Networks Internatl.*, *infra*; *Paragon Networks, Internatl. v. Macola, Inc.* (Apr. 28, 1999), Marion App. No. 9-99-2, *unreported*, 1999 WL 280385, at **4, citing *Busler*, *supra*, and *Wall*, *infra*; *Bollinger, Inc. v. Mayerson* (1996), 116 Ohio App.3d 702, at 712, 689 N.E.2d 62, at 69, appeal not allowed (1997), 78 Ohio St.3d 1467, 678 N.E.2d 223, citing *Busler, supra*; *Wall* and *Edwards*, *infra*; *Edwards v. Thomas H. Lurie & Assoc.* (Jan. 12, 1995), Franklin App. No. 94APE01-21, *unreported*, 1995 WL 12126, at **3, citing *AmeriTrust Co.*, *supra*, and *Maust*, *infra*; *Wall v. Firelands Radiology, Inc.* (1995), 106 Ohio App.3d 313, at 324, 666 N.E.2d 235, at 242, appeal not allowed (1996), 74 Ohio

St.3d 1512, 659 N.E.2d 1289, citing *Busler, supra*; *Yaroma v. Griffiths* (1995), 104 Ohio App.3d 545, at 553-54, 662 N.E.2d 867, at 872, citing *Busler, supra*; *Maust v. Bank One Columbus, N.A.* (1992), 83 Ohio App.3d 103, at 108, 614 N.E.2d 765, at 768, jurisdictional motion overruled (1993), 66 Ohio St.3d 1488, 612 N.E.2d 1244, citing *Busler* and *AmeriTrust Co., supra*. See, also, *Columbia Gas Transm. Corp. v. Ogle* (S.D.Ohio 1997), 51 F. Supp.2d 866, at 873, affirmed without published opinion (C.A.6 1998), 172 F.3d 47, citing *AmeriTrust Co., supra*.

The above cited cases conflict with the majority view, espoused by courts in other jurisdictions, which provides — in various circumstances — that parol evidence is admissible to prove fraud, even though it contradicts a writing. See, *e.g.*, *Barreda v. Silsbee* (1858), 62 U.S. (How.) 146, at 170, 16 L.Ed. 86, at 94; *Pinnacle Peak Developers v. TRW Invest. Corp.* (App.1980), 129 Ariz. 385, at 389-90, 631 P.2d 540, at 544-45; *Touche Ross Ltd. v. Filipek* (1989), 7 Haw.App. 473, at 482-83, 778 P.2d 721, at 727-28; *Harvey v. Pierce* (La.App.1963), 150 So.2d 921, at 925; *Ruff v. Boltz* (1968), 252 Or. 236, at 238, 448 P.2d 549, at 550; *Continental Jewelry Co. v. Kerhulas* (1926), 136 S.C. 496, at 503, 134 S.E. 505, at 507; *Waybourn v. Spurlock* (Tex.App.1926), 281 S.W. 587, at 589; *Mawhinney v. Jensen* (1951), 120 Utah 142, at 153, 232 P.2d 769, at 775; *Thomas v. Gray Lumber Co.* (1997), 199 W.Va. 556, at 562, 486 S.E.2d 142, at 148.

Interestingly, in adopting the minority approach, both *Busler* and *AmeriTrust Co.* relied on authority that did not support their legal proposition. In *AmeriTrust Co.*, the Court of Appeals correctly cites *Walters, supra*, as standing for the fraud exception. The Court then continues by asserting that, nevertheless, the parol evidence rule precludes the introduction of evidence which attempts to "vary" or "contradict" items contained in a contract. For this, the Court relies on *Gerwin v. Clark* (1977), 50 Ohio App.2d 331, at 332-33, 4 O.O.3d 283, at 284, 363 N.E.2d 602, at 604.

Gerwin was not a fraud case. In *Gerwin*, the defendant introduced evidence of an oral agreement ("April 1970 contract") rescinding an earlier written contract ("September 1969 contract"). For obvious reasons, the Court held that this did not violate the parol evidence rule. *Id.* at 333, 4 O.O.3d at 284, 363 N.E.2d at 604. There was also another contract ("June 1970 contract"), which was entered into subsequent to both the September 1969 and April 1970 contracts. The June 1970 contract was limited in scope and did not cover the same subject matter as the April 1970 contract. This being the case, the Court held that the June 1970 contract did not bar the introduction of the April 1970 contract, which allegedly rescinded the September 1969 contract. *Id.* Undoubtedly, on the facts of the case, *Gerwin* was decided correctly. However, *Gerwin* does not stand for the proposition that it is cited for in *AmeriTrust Co.*

Also, the Court in *AmeriTrust Co.* cited *Neil v. Board of Trustees of Ohio Agricultural & Mechanical College* (1876), 31 Ohio St. 15, for the same proposition as *Gerwin*. *Neil* was also not a fraud case. In *Neil*, the defendant had signed a written guarantee, which stated simply that he "guarantee[d] that said several sums of money shall be paid by the several persons to said treasurer at the times nominated in said several subscriptions." *Id.* at 16. However, the defendant later insisted that "it was understood and agreed between the parties, by a contract resting in parol, that Neil was not to become liable on the guaranty, until an effort to collect the sum subscribed from the subscriber * * * by legal process, had been made and failed." *Id.* at 19. Our Supreme Court held that the purpose of the proffered evidence was to "contradict the written instrument sued on, and to destroy its legal effect, by showing the guaranty to be one for collection, rather than the payment, of the sum subscribed." *Id.* Had the trial court received the asserted testimony, the parol evidence rule would have been violated. *Id.* Like *Gerwin*, *Neil* was correctly decided, though it does not stand for the

proposition that it is cited for in *AmeriTrust Co.*

Nevertheless, after citing *Gerwin* and *Neil*, the Court of Appeals in *AmeriTrust Co.* stated that the defendant-appellant could not argue he had been the victim of fraud because the terms of the contract contradicted his argument. 20 Ohio App.3d at 335, 20 OBR at 438, 486 N.E.2d at 183. As can be discerned from the above discussion, the case law upon which the *AmeriTrust Co.* Court relied does not lead to this conclusion.

The Court of Appeals in *Busler* made a similar mistake. First, the Court cited *AmeriTrust Co.*, which, as was seen above, failed to cite any relevant authority. Second, the Court cited *Stegawski*, *supra*. In *Stegawski*, the plaintiff alleged that the defendant fraudulently induced him to accept employment. According to the plaintiff, the defendant stated that he would become a shareholder in the medical corporation once he became a board certified anesthesiologist. 370 Ohio App.3d at 78-79, 523 N.E.2d at 904. However, the employment contract that the plaintiff signed did not contain any mention of his possibly becoming a shareholder. *Id.* at 81, 523 N.E.2d at 906. The *Stegawski* Court noted that the parol evidence rule does not exclude evidence of fraud. *Id.* at 84, 523 N.E.2d at 908-09. "In the instant case, appellant [*i.e.*, the plaintiff] makes just such an allegation [*i.e.*, fraud]." *Id.* at 84, 523 N.E.2d at 909. In dicta, the Court noted that the alleged fraudulent misrepresentation "would add to the contract, not vary or contradict the existing terms." *Id.* The Court did not say whether the result would have been different had the representation conflicted with the written contract.[6] Hence, this case does not stand for the *per se* rule announced in *Busler*.

Additionally, *Busler* relied on the Restatement, *supra*, at 136, Section 215, for the proposition

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[6] Of course, in the later decision of *Yaroma*, *supra*, the Eighth District distinguished *Stegawski* and followed *Busler*.

that "if there is a binding and integrated agreement, then evidence of prior or contemporaneous representations is not admissible to contradict the unambiguous, express terms of the writing." *Busler*, 81 Ohio App.3d at 390-91, 611 N.E.2d at 356. The Restatement provides:

> *Except as stated in the preceding Section*, where there is a binding agreement, either completely or partially integrated, evidence of prior or contemporaneous agreements or negotiations is not admissible in evidence to contradict a term of the writing.

Restatement, *supra*, at 136, Section 215 (emphasis added). See, also, *Doyle Walters Distribs., Inc. v. Marathon Petroleum Co.* (Sept. 29, 1992), Richland App. No. 92-CA-2, *unreported*, 1992 WL 318843, at **3 (citing to this section); *Gibbons-Grable-Goettle, A Joint Venture v. Northeast Ohio Regional Sewer Dist.* (Jan. 23, 1986), Cuyahoga App. No. 49132, *unreported*, 1986 WL 1061, at **9 (same). The "preceding section" to which this section refers is Section 214. As will be remembered, Section 214 set forth the fraud exception. The plaintiff-appellant in *Busler* sought recission, restitution, in addition to damages. Thus, Section 214 of the Restatement should have made admissible the proffered evidence of fraud. Unfortunately, the *Busler* Court ignored the built-in exception to the section upon which it relied, and established a legally unsupported rule of law.

As discussed, none of the authorities cited by either *Busler* or *AmeriTrust* Co. provide that, generally speaking, the parol evidence rule bars the introduction of evidence to prove fraud, even though such would contradict the written terms of a contract. Without any apparent support, and no substantive legal discussion, these two cases quietly adopted a minority approach that has since been cited by many courts, and on numerous occasions, without question. Indeed, as was stated by the Third District Court of Appeals in *J.A. Industries, Inc.*, *supra*, 133 Ohio App.3d at 88, 726 N.E.2d at 1074: "Ohio law is well settled that the parol evidence rule may apply to exclude evidence of fraudulent inducement in certain cases." The law is neither well settled, nor necessarily correct.

From the above discussion it should be clear that, in contracts cases, where one desires to introduce evidence of fraud as an invalidating cause parol evidence is always admissible. See Restatement, *supra*, at 132-33, 136, Sections 214, 215. If we must apply the parol evidence rule in tort cases — which is questionable — there is no logical reason why the so-called "fraud exception" should not also apply where one affirms a contract and seeks damages for fraud, even though the proffered "parol evidence" conflicts with an apparently integrated writing between the parties. Cf. Sweet, Promissory Fraud and the Parol Evidence Rule (1961), 49 Cal. L.Rev. 877, at 897-903. As such, this Court rejects the rule set forth in *Busler* and *AmeriTrust Co.*

By allowing defrauded parties to affirm contracts, which were induced by fraud, and sue for damages — even though the claimed fraud seems to contradict what is provided for in the writings — this Court is not opening proverbial "flood-gates" to disgruntled consumers. In cases of fraud, a complaining party must satisfy heightened procedural requirements, meet affirmative burdens, and overcome presumptions; these act as "safeguards" against unfounded accusations. See Harper et al., *supra*, at 449-51, Section 7.10. See, also, 51 Ohio Jurisprudence 3d (1984), Fraud and Deceit, Sections 226, 236, 239. Public policy also supports the view enunciated by the Court. Merely permitting a party to introduce evidence of fraud as an invalidating cause "may not be capable of adequately policing deceptive conduct. If the only penalty is [recission and] restoration of the *status quo*, much may be gained by the deceiver with little risk. * * * Such a restriction clearly would hamper the effectiveness of efforts to minimize fraudulent dealings." Sweet, *supra*, at 899-90 (citations omitted). It is worth remembering the sentiments of Judge Hand, in *Arnold v. National Aniline & Chem. Co.* (C.A.2 1927), 20 F.2d 364, at 369:

> [T]he ingenuity of draftsmen is sure to keep pace with the demands of wrongdoers, and if a deliberate fraud may be shielded by a clause in a contract * * *, sellers of

> the nature of the transaction, the form and materiality of the representation, the relationship of the parties, the respective intelligence, experience, age, and mental and physical condition of the parties, and their respective knowledge and means of knowledge.

Van Camp v. Bradford (1993), 63 Ohio Misc.2d 245, at 255, 623 N.E.2d 731, at 738 (citation omitted). It should be noted that a trial court may not, at the summary judgment stage, try facts or assess credibility. *McGuire v. Lovell* (1998), 128 Ohio App.3d 473, at 479-80, 715 N.E.2d 587, at 592, appeal dismissed (1999), 85 Ohio St.3d 1216, 709 N.E.2d 841; *Carlton v. Davisson* (1995), 104 Ohio App.3d 636, at 649, 662 N.E.2d 1112, at 1120.

The Court has not found any cases on all fours with the one currently before it, and cannot say that the defendant's reliance was unjustifiable as a matter of law. Two points should be made. First, the defendant saw that the "purchase" was being drawn up on a lease form. This put him on notice that something was askew; he was required to "inquire" into the matter. *See, e.g., Ralston v. Grinder*, (1966), 8 Ohio App.2d 208, at 211, 37 O.O.2d 213, at 215, 221 N.E.2d 602, at 604-05; 165; *Ellis v. M.S. Benn & Co.* (App.1927), 6 Ohio Law Abs. 349, at 350. This the defendant did; he asked why the purchase was being written up on a lease form. Mr. Stetson allegedly responded by saying that was the way all purchases were written up.[7] Where a party makes a representation in direct response to an "inquiry," the individual is entitled to a full and truthful answer; any representation made may be justifiably relied upon. See, *e.g., Foust v. Valleybrook Realty Co.* (1981), 4 Ohio App.3d 164, at 167, 4 OBR 264, at 267-68, 446 N.E.2d 1122, at 1126; *Steiner v. Roberts* (App.1955), 72 Ohio Law Abs. 391, at 397, 131 N.E.2d 238, at 243; *Van Camp, supra*, 63

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[7] There is some evidence that Mr. Stetson told Mr. Krull he was leasing, not purchasing, the vehicle. However, viewing all the facts in the light most favorable to the defendant, as this Court must, Mr. Krull's deposition testimony is accepted as true herein.

Ohio Misc.2d at 255, 623 N.E.2d at 738. See, also, *Ash v. Georgia-Pacific Corp.* (C.A.7 1992), 957 F.2d 432, at 436; 3 Restatement of the Law 2d, Torts (1977) 88, Section 240. Thus, Mr. Krull was permitted to rely upon Mr. Stetson's statement.

Second, and in the alternative, general principles of Ohio tort law preclude one from fraudulently inducing another to enter into a contract, which is to his or her detriment, and then defensively asserting that the other party failed to reasonably inquire as to the truth of the matter, where he or she "does or says anything to divert the buyer 'from making the inquiries and examination which a prudent man [or woman] ought to make.'" *Hitachi Credit Am. Corp. v. Signet Bank* (C.A.4 1999), 166 F.3d 614, 629, quoting *Horner v. Ahern* (1967), 207 Va. 860, at 864, 153 S.E.2d 216, at 219. Cf. *Padgett, supra*, 130 Ohio App.3d at 124-25, 719 N.E.2d at 641. By telling Mr. Krull that all sales were written up on lease forms, taking him to the "little dingy dungeon" office, pressuring him to quickly sign the papers shoved in front of him, etc., the plaintiff's conduct could be construed as an attempt to prevent Mr. Krull from making a reasonable assessment of the situation and investigation into the truth of the matter. Although the Court does not make any holding on this issue herein, such is a serious concern.

For these reasons, the Court believes that the defendant's reliance was not unjustified as a matter of law. Summary judgment is denied on this point.

D. Punitive Damages

Punitive damages are available in cases grounded in the tort theory of fraudulent inducement. See *Charles R. Combs Trucking, Inc. v. International Harvester Co.* (1984), 12 Ohio St.3d 241, at 245, 12 OBR 322, at 326, 466 N.E.2d 883, at 888. See, also, *Mid-America Acceptance Co. v. Lightle* (1989), 63 Ohio App.3d 590, at 601-02, 579 N.E.2d 721, at 729. Such damages are not in

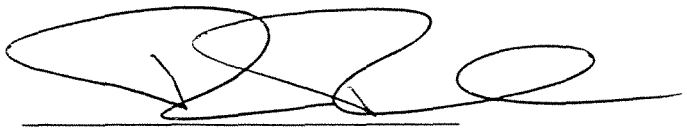
the nature of compensation for any injury actually suffered. *Garrison v. Bricker* (C.P.1909), 7 Ohio Law Rptr. 337, at 339, 54 W.L.B. 497, at 499. Rather, they are assessed for the purpose of punishment, to deter the defendant (herein the plaintiff) and others from engaging in similar conduct. *Bloomer v. Cherry* (C.P.1907), 5 Ohio Law Rptr. 534, at 536, 53 W.L.B. 23, at 25. A party seeking punitive damages must show, in addition to other things, that he or she is entitled to actual damages. See, *e.g.*, *Richard v. Hunter* (1949), 151 Ohio St. 185, at 187-88, 39 O.O. 24, at 25, 85 N.E.2d 109, at 110-11; *McClanahan v. Koviak* (1939), 62 Ohio App. 307, at 312, 16 O.O. 18, at 20, 29 Ohio Law Abs. 529, at 532, 23 N.E.2d 975, at 977; *Schumacher v. Siefert* (1930), 35 Ohio App. 405, at 406-07, 8 Ohio Law Abs. 431, at 432, 172 N.E. 420, at 420-21.

The plaintiff attacks the defendant's counterclaim for punitive damages, arguing that because the defendant should not be able to recover actual damages in tort (*i.e.*, conversion or fraud), his punitive damages counterclaim should, *a fortiori*, be dismissed. This argument fails; the defendant's counterclaim for fraud subsists. Thus, summary judgment is not granted as to this point.

IV. Conclusion

Summary judgment is granted only with respect to the defendant's counterclaim for conversion. As to the remaining counterclaims, the plaintiff's motion for summary judgment is denied. This is not a final appealable order.

It is so ordered.



Judge Robert P. Ringland