

IN THE SUPREME COURT OF OHIO

Craig L. Whitaker,

Appellant,

v.

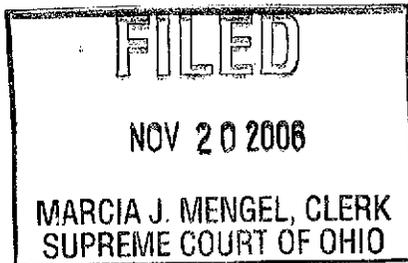
M.T. Automotive, Inc.
dba Montrose Toyota, Inc.,

Appellee.

Case No. 05-331

On Appeal from the
Summit County Court of
Appeals, Ninth District
Case No. 21836

AMICUS BRIEF IN SUPPORT OF APPELLEE'S MOTION FOR RECONSIDERATION
BY AMICI CURIAE THE
OHIO AUTOMOBILE DEALERS ASSOCIATION
AND
OHIO COUNCIL OF RETAIL MERCHANTS



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**AMICUS BRIEF IN SUPPORT OF APPELLEE'S
MOTION FOR RECONSIDERATION**

Ohio Appellate Rule 26, and Rule XI of the Rules of Practice of the Supreme Court of Ohio, provide a mechanism for the prevention of miscarriages of justice such as the result of this Court's initial decision in the case at bar. This Court's decision interpreted the Consumer Sales Practices Act ("CSPA") in a manner never intended by the legislature, and, in so doing, made various errors of statutory interpretation.

As more fully detailed in Appellee's motion for reconsideration, the Ohio Revised Code specifically states that the CSPA does not apply to claims for personal injury. O.R.C. §1345.12(C). Thus, this Court's decision has rendered that provision void of any substance by permitting precisely the opposite, that is, recovery of personal injury claims under the CSPA (including the trebling of the resulting damages).

In addition to lending their voices to the arguments asserted by Appellee, *amici curiae* wish to point out that this Court's decision in the case at bar inconsistently applied the meaning of the term "actual damages." On the one hand, this Court found momentous import in the fact that the word "actual" had been removed from R.C. § 1345.09(A), while, on the other hand, it attributed no weight whatsoever to the fact that the modifier "actual" remained in R.C. § 1345.09(B).

In analyzing § 1345.09(A), this Court noted that, in the 1978 amendments to the CSPA, the word "actual" was removed from the previous version's use of the term "actual damages." The Court then went on to write that "[w]hen the word 'damages' is used without modification, we have held that the term is broad in scope. . . . 'Damages,' absent a restrictive modifier like 'compensatory,' 'actual,' 'consequential' or 'punitive,' is an inclusive term embracing the panoply of legally recognized pecuniary relief.'" Opinion at ¶ 14 (citation omitted). The

Court based this opinion on the fact that the word "actual," a "restrictive modifier," had been removed from its place in front of the term damages in the prior version of the statute.

In the next breath, however, the Court changed course completely, and, in assessing the trebling of damages under § 1345.09(B), determined that "noneconomic damages" are included in the category of "actual damages." This may be so; however, if in fact noneconomic damages are included in the category of actual damages, then the removal of the term "actual" in § 1345.09(A) is of absolutely no moment. If all "actual damages" means is damages that are not punitive damages, then the Court erred in relying on removal of the word "actual" to determine that noneconomic damages are included within the term "damages" under § 1345.09(A).

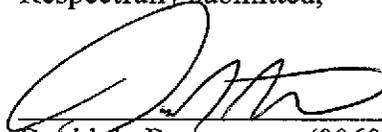
The result is inconsistent and contrary to the statutory language. If actual damages includes noneconomic damages, then the Court's entire rationale for holding that "all forms of compensatory relief, including noneconomic damages, are included within the unrestricted term 'damages' under R.C. 1345.09(A)" is made up from whole cloth. This Court based its reading of § 1345.09(A) on the fact that the word "actual" had been removed from the statute. Because § 1345.09(A) formerly permitted a consumer to recover "actual damages," but now permits the consumer to recover "damages," this Court reasoned, the statute must permit recovery of noneconomic damages.

In direct contrast to this line of reasoning, however, the Court went on to decide that noneconomic damages are to be trebled under the CSPA, even though the CSPA calls only for the trebling of "actual damages" in § 1345.09(B). Thus, the Court determined that noneconomic damages are a subset of actual damages, which contradicts the rationale used in its analysis of § 1345.09(A).

CONCLUSION

Amici curiae concur with the arguments asserted by Appellee in its motion for reconsideration, and maintain that the Court's decision in the case *sub judice* is contrary to the intent of the legislature and a proper reading of the statute. In addition, this Court makes an untenable error of logic in its interpretation of §§ 1345.09(A) and (B) which also requires a reconsideration of the opinion.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served on the following counsel of record, by regular U.S. Mail, postage prepaid, this 20 day of November, 2006:

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