

IN THE SUPREME COURT OF OHIO

State of Ohio ex rel. Nancy Rogers,
Attorney General of Ohio,

Plaintiff-Appellee,

v.

Midway Motor Sales, Inc., et al.,

Defendant-Appellee,

(General Motors Acceptance Corporation,
n/k/a GMAC LLC,

Defendant-Appellant).

: Case No.

08-1451

: ON APPEAL FROM THE FRANKLIN
: COUNTY COURT OF APPEALS, TENTH
: APPELLATE DISTRICT

: Court of Appeals
: Case No. 07AP-744

MEMORANDUM OF DEFENDANT-APPELLANT
GMAC LLC IN SUPPORT OF JURISDICTION

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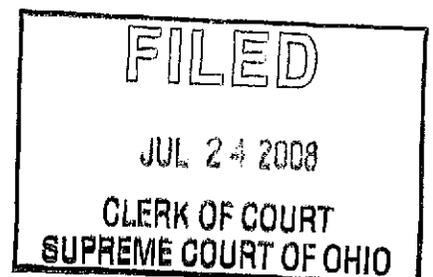


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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC
OR GREAT GENERAL INTEREST

This Appeal presents a critical commercial issue of first impression for this Court. Its resolution is paramount to innocent finance companies like GMAC and other businesses that operate in Ohio. But it also affects innocent ordinary consumers who trustingly sign the state-mandated odometer disclosure affidavit “to the best of their knowledge” when transferring a vehicle.¹

In issuing the decision from which GMAC seeks to appeal, the Tenth District Court of Appeals (“Tenth District”) expressly opined that the resolution of this issue may “rest[] with a higher court of law...” Opinion at 9 (emphasis added). The issue is this: can an innocent vehicle owner selling a vehicle in the State of Ohio, who itself is an unknowing victim of odometer tampering, like GMAC here, be held strictly liable when it provided true and complete odometer disclosure statements on the State of Ohio’s mandated disclosure form? That mandatory disclosure form requires a knowledge based certification of (1) the physical odometer reading appearing on the vehicle and (2) the reliability of that odometer reading. That is what GMAC gave. The Tenth District’s ruling, citing appellate cases decided on other facts, wrongly answers yes.

The consequence of the Tenth District’s decision is GMAC (or any other bank or finance company), an acknowledged unknowing victim of odometer tampering perpetrated by a corrupt dealer, is strictly liable even though it provided true and complete odometer disclosure statements as required by O.R.C. § 4549.46(A) of the Ohio Odometer Rollback and Disclosure

¹ The countless private citizens who are required to complete the form when transferring vehicles also could face strict liability for odometer tampering perpetrated without their knowledge. For example, under the Tenth District’s ruling, if any citizen of the State of Ohio took his vehicle in for service, and unbeknownst to him the repair shop did something to the vehicle that caused the odometer to record the mileage inaccurately, and he subsequently sought to sell or trade in his vehicle, the private citizen filling out the affidavit truthfully to the best of his knowledge using the odometer reading on the vehicle nonetheless would be strictly liable for an untrue odometer disclosure.

Act (the “Odometer Act”). In so ruling, the Tenth District primarily relied upon dicta from distinguishable non-binding appellate decisions that O.R.C. § 4549.46(A) is a strict liability statute. The critical distinguishing fact in those cases is that the defendant was the actual wrongdoer (i.e., the party who rolled back the odometers). Those defendants obviously had actual knowledge of the inaccurate odometer reading and could not truthfully certify to the best of their knowledge that the physical odometer reading appearing on the vehicle was reliable.

That is not the case here at all. GMAC had no knowledge of the odometer tampering perpetrated on its vehicles by the dealership, Midway Motor Sales, Inc. (“Midway”), a previous owner of the vehicles. When GMAC completed the odometer disclosure affidavits at the time of vehicle transfer, it indicated to the best of its knowledge (1) the physical odometer reading appearing on the vehicle (which, unbeknownst to GMAC, had been altered) and (2) the reliability of the reading. The disclosures in these affidavits were, in fact, true, as the Ohio Attorney General readily admits and as the trial court recognized. Under these circumstances, to find GMAC strictly liable under O.R.C. § 4549.46(A), the lower courts essentially had to alter the odometer disclosure affidavits after-the-fact to wipe out the “to the best of my (our) knowledge” language.² That is entrapment and alteration of evidence. Ohio law should not condone such a result. Instead, this Court needs to clarify the law so as to ensure that innocent, unknowing vehicle sellers, including finance companies like GMAC, are not getting ensnared in a strict liability net simply because they appear in the chain of title for a vehicle.

Moreover, the trial court’s and Tenth District’s rulings directly conflict with the statutory

² This is apparent from the lower courts’ opinions, in which they -- like the Ohio Attorney General -- completely fail to reconcile the knowledge-based certification required by the Registrar-prescribed odometer disclosure form with the case law holding the statute to be a strict liability statute. This Court needs to address the lower courts’ continued misinterpretation and misapplication of Ohio law and perpetuation of the Ohio Attorney General’s entrapment of GMAC and alteration of evidence for the benefit of all vehicle transferors in the State of Ohio.

provisions and legislative history. The express language of O.R.C. § 4549.46(A) specifically refers to and incorporates O.R.C. § 4505.06(C)(1), which requires the Registrar to promulgate the affidavit form for odometer disclosure statements to be executed by each transferor in a vehicle transaction in the State of Ohio. Those mandatory odometer disclosure affidavit forms promulgated by the Registrar contain an express “to the best of my (our) knowledge” standard. In this case, GMAC, a financing company, executed the state-mandated affidavits, attesting to the odometer readings and their reliability to the best of its knowledge. GMAC’s affidavits were true and complete, and in the form, and based on the standard, prescribed by Ohio law. Simply put, a clear and obvious conflict exists between the statute and state-mandated forms promulgated pursuant to the statute containing a knowledge standard, on the one hand, and the lower courts’ interpretation of the statute as a strict liability statute, on the other hand. Given the number of vehicle transactions that occur in the State of Ohio, this conflict needs immediate resolution by this Court.

No Ohio court has ever addressed this conflict. Indeed, not a single Ohio court has ever been confronted with the situation here: a finance company (or any other vehicle transferor for that matter) with no knowledge of or involvement in the odometer tampering of its vehicles is held strictly liable for an inaccurate odometer disclosure when it is undisputed that the disclosure was, in fact, true and complete to the best of the finance company’s knowledge. In short, it is unconscionable for Ohio law to hold a citizen of the State of Ohio or any company doing business in the State of Ohio strictly liable for an inaccurate disclosure when the disclosure is, in fact, true and complete in accordance with the state-mandated form and standard. The Tenth District declined to address the merits of this situation and suggested that GMAC seek resolution by this Court. Opinion at 9. Given the public and great general interest at stake here, and the

Tenth District's suggestion, GMAC respectfully requests this Court take jurisdiction over this matter and resolve the clear conflict between the case law and statutory law.

The strict liability ruling impacts the willingness of GMAC and other finance companies to do business involving vehicle sales transactions in the State of Ohio. In essence, the Tenth District's ruling discourages GMAC, other companies, and even Ohio citizens from selling vehicles in the State of Ohio, because they expose themselves to strict liability even though they are complying with the dictates of the law as it currently stands. It is common practice for finance companies to take assignment of vehicle lease agreements that dealerships enter into with their customers and obtain title to the underlying leased vehicles but never have possession, custody or control of the vehicles. Holding companies strictly liable simply because they are in the chain of title significantly increases their risks and costs of doing business in Ohio. Even in the best economic times, companies will take this into account in determining whether to engage in the leasing business in Ohio or to dispose of off-lease vehicles in Ohio, especially when neighboring states like Michigan (where GMAC is headquartered) unequivocally do not impose strict liability for odometer disclosure violations.

The Tenth District's ruling also will have a chilling effect on the willingness of persons to report suspected odometer tampering and/or to come to the aid of other fraud victims inasmuch as it sends the message "no good deed goes unpunished." When GMAC uncovered the odometer rollbacks by Midway, it reported Midway's misconduct to the Ohio Attorney General and spent over \$1.2 million in remediating the owners of the affected vehicles. And what was the end result? GMAC was re-victimized by this lawsuit. Ohio law should seek to encourage, not discourage, the reporting of odometer tampering to the authorities as GMAC did here. However, companies will be unlikely to report such activities if their reward for being

good corporate citizens is to have the authorities turn on them and sue them for strict liability. That is exactly what happened to GMAC here.

Finally, the Tenth District's ruling will also have a chilling effect on law enforcement efforts, because companies will be reluctant to voluntarily and affirmatively cooperate and facilitate law enforcement investigations. GMAC provided the Ohio Attorney General evidence to use against Midway and provided access to GMAC employees to facilitate the investigation, only to have the Ohio Attorney General file a six-count complaint against GMAC and Midway, naming GMAC in five of those counts. While four of the five counts were ultimately dismissed, the fact that they were alleged at all in the face of GMAC's cooperation with the Ohio Attorney General's investigation, sends the message "cooperate at your own risk". The resulting chilling effect on cooperation will increase the burden on law enforcement agencies to investigate alleged illegal activity, potentially allowing wrongdoers to escape punishment altogether.³

This Court has the opportunity to give clarity to banks and finance companies doing business in Ohio and private citizens alike that when they transfer a vehicle and truthfully identify the mileage on their odometer "to the best of [their] knowledge," they will not have their executed affidavit essentially altered by Ohio courts and/or be entrapped with strict liability. Likewise, this Court also has the opportunity to correct the misapplication of Ohio law perpetuated by the Tenth District, to promote certainty in the realm of vehicle transfers in the State of Ohio, and to eliminate any disincentive to reporting odometer violations. Accordingly, this Court should grant jurisdiction and review the erroneous findings of the Tenth District.

³ A purpose of the Odometer Act, a public welfare law, is to promote true disclosure of odometer readings and their reliability at the time of vehicle transfer. If the "to the best of my (our) knowledge" standard language in the state-mandated odometer disclosure form is wiped out, then transferors will have no choice but to check the box on the form that indicates accuracy of mileage reading unknown to protect themselves against potential unknown odometer tampering of their vehicles by third party. If every transferor begins to check that box, it essentially nullifies the Act.

STATEMENT OF THE CASE AND FACTS

The underlying facts in this litigation are undisputed. Midway purchased vehicles from General Motors Corporation ("GM") to offer for sale and/or lease at its dealership located near Youngstown, Ohio, making Midway the owner of those vehicles. Midway thereafter leased numerous of these vehicles to Modern Builders Supply, Inc. ("MBS") under lease agreements that contained specific mileage limits, typically of 30,000 miles. Pursuant to its GMAC Lease Plan Dealer Agreement with GMAC, Midway thereafter assigned the lease agreements and lease vehicles to GMAC, at which time those vehicles were titled in GMAC's name ("GMAC Leases").

Unbeknownst to GMAC at the time, Midway and MBS entered into separate and secret lease arrangements for the same vehicles, allowing MBS significantly greater mileage limits than allowed under the GMAC Leases. At lease end, a number of the vehicles leased by MBS generally had substantially more mileage on them than the 30,000-mileage allowance provided under the GMAC Leases. Midway retrieved the leased vehicles from MBS' premises and then altered and/or rolled back their odometers, so the odometer readings fell within the mileages allowed under the GMAC Leases, thereby concealing the excess mileage from GMAC. Those vehicles were never in GMAC's physical possession.

Without any notice or knowledge of the odometer tampering and fraud perpetrated by Midway, GMAC sold those vehicles at dealer-only auctions. As a part of each auction sale, GMAC truthfully and completely, to the best of its knowledge, completed the Registrar's prescribed form of odometer disclosure affidavit. This affidavit form expressly and unambiguously states that the odometer disclosure shall be based upon the transferor's knowledge:

I (we) certify to the best of my (our) knowledge that the odometer now reads □□□,□□□ miles and is the actual mileage of the vehicle unless one of the following statements is checked . . . (emphasis added)

The affidavit form is a mandatory form, prescribed by the State of Ohio through the Registrar of the Ohio Bureau of Motor Vehicles.

In the Spring of 2004, GMAC uncovered the odometer tampering and fraud perpetrated by Midway while reviewing mileage discrepancies in vehicle records received from MBS. GMAC then investigated those discrepancies and suspected that the odometers of certain vehicles had been altered. GMAC timely reported the situation to the Attorney General. GMAC complied fully with the Attorney General's requests for information, unconditionally and zealously working to assist the Attorney General in its investigation and prosecution of Midway, the true wrongdoer.

GMAC also developed and implemented its own remediation plan to identify, locate, and remediate the 72 current owners of the affected vehicles. Upon learning of GMAC's remediation plan and efforts, the Attorney General admits he raised no objection whatsoever and expressly and unconditionally endorsed and encouraged GMAC to continue its remediation efforts. Because of GMAC, no consumer has been harmed by Midway's fraud. Specifically, GMAC negotiated with each individual owner of the affected vehicles and, at the election of the owner, either bought the vehicle back or paid an agreed upon monetary adjustment for the mileage. All told, this remediation effort cost GMAC over \$1.2 million.

Notwithstanding the encouragement of GMAC's remediation efforts and acknowledgement that GMAC had no knowledge of, or involvement in, Midway's odometer tampering and fraud, the Attorney General sued GMAC on January 6, 2005 in the Franklin County Court of Common Pleas, alleging that GMAC should be strictly liable for giving false

odometer disclosure statements. Thereafter, the Attorney General filed a motion for partial summary judgment on liability for its claim under the Odometer Act, which the trial court granted. Following a damages hearing, the trial court imposed a statutory civil penalty against GMAC of \$1,000 per violation, which it immediately suspended. GMAC timely appealed to the Tenth District. On June 10, 2008, the Tenth District affirmed the rulings of the trial court.

ARGUMENTS IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: O.R.C. § 4549.46(A) is not a strict liability statute inasmuch as it expressly and unambiguously incorporates the odometer disclosure requirements set forth in O.R.C. § 4505.06, which mandates the Registrar of the State of Ohio to promulgate a mandatory odometer affidavit disclosure form that vehicle transferors must complete and the form requires disclosures to the best of the transferor's knowledge.

Despite the ruling of the Tenth District and other lower courts before it, O.R.C. § 4549.46(A) is not a strict liability statute. O.R.C. § 4549.46(A), the odometer disclosure statute at the heart of the Attorney General's claim, expressly and unambiguously incorporates the odometer disclosure requirements set forth in O.R.C. § 4505.06:

No transferor shall fail to provide the true and complete disclosures required by section 4505.06 of the Revised Code.

O.R.C. § 4549.46(A) (emphasis added). Those "true and complete" disclosures (required by O.R.C. § 4505.06 are set forth in O.R.C. § 4505.06(C)(1), specifically:

The registrar shall prescribe an affidavit in which the transferor shall swear to the true selling price and, except as provided in this division, the true odometer reading of the motor vehicle. . . .

Pursuant to the statutory mandate of O.R.C. § 4505.06(C)(1), the Registrar prescribed the mandatory affidavit for use by all vehicle transferors in Ohio, and it expressly and unambiguously states that the odometer disclosure must be based upon the transferor's knowledge:

I (we) certify to the best of my (our) knowledge that the odometer now reads □□□,□□□ miles and is the actual mileage of the vehicle unless one of the following statements is checked . . . (emphasis added).

Simply stated, it is undisputed that the odometer disclosure affidavit forms prescribed by the Registrar require knowledge-based certifications about the vehicle odometer reading and the reading's reliability. Even the Registrar freely admits this. It almost goes without saying that strict liability cannot co-exist with a knowledge element.

The Tenth District did not analyze the merits of GMAC's statutory arguments, nor did it attempt to reconcile the blatant conflict between the case law and the statutorily prescribed odometer disclosure affidavit. Instead, the Tenth District focused on GMAC's argument that the legislative history of the Odometer Act confirms that the Legislature did not intend for odometer disclosure violations to carry strict liability. Opinion at 8-9. The Tenth District claimed that if the Legislature did not intend for O.R.C. § 4549.46(A) to operate as a strict liability statute, the Legislature would have amended the provision. *Id.*⁴ Under no reading of it, does this reasoning comport with the actual legislative history.

As GMAC set forth on appeal, the legislative history of O.R.C. § 4549.46 clearly evinces an intent to incorporate the knowledge element contained in O.R.C. § 4505.06. From the outset of the bill, the Legislature provided that the transferor must "provide the odometer disclosure required at the time of transfer." S.B. 78 (as introduced), 112th Gen. Assem., p. 4 (Ohio 1977). The legislative history of O.R.C. § 4505.06 itself shows the knowledge requirement:

⁴ The Tenth District's blanket assumption that strict liability can be divined in this case simply because the Legislature did not proactively amend the provision is not in line with this Court's precedent. This Court expressly has mandated that courts are not to impose strict liability under a statute unless the Legislature explicitly and unambiguously so provides. *State v. Collins* (2000), 89 Ohio St.3d 524, 529 (emphasis added). Indeed, this Court recently affirmed its holding in *Collins* when it rejected the state's attempt to impose strict liability under a statute that did not expressly indicate such an intent. See *State v. Moody* (2004), 104 Ohio St.3d 244, 247 (holding that where the General Assembly did not plainly indicate it intended to impose strict liability, the court would be violating well-settled principles of statutory construction if it read strict liability into the statute).

The [odometer] statement must show the mileage registered on the motor vehicle at the time the transferor assigns the title, and whether the odometer reading reflects the actual mileage, whether it reflects mileage in excess of the designed limit of 99,999 miles, or whether the transferor believes it does not reflect the actual mileage and should not be relied upon. The transferor also must certify in the statement that, to the best of his knowledge, the odometer was not altered, set back, or disconnected while the motor vehicle was in the transferor's possession, or that it was repaired or replaced during that time.

Am. S.B. 115 (as reported, H. Civil & Commercial Law), 115th Gen. Assem., p. 5 (Ohio 1983) (emphasis added). Immediately thereafter, the bill goes on to state: "Existing section 4549.46 then prohibits a person from failing to provide the true odometer mileage disclosures required to be given in the statement just described." Id. The "statement just described" is based on the transferor's knowledge. Simply put, the legislative history of O.R.C. §§ 4549.46 and 4505.06 establish the Legislature's intent to incorporate a knowledge component for odometer disclosure violations.

Moreover, in construing O.R.C. § 4549.46(A), it should be presumed that the Legislature intended a just and reasonable result. See O.R.C. § 1.47(C). Here, strict liability does not lead to a just and reasonable result: GMAC, an innocent party, is being held strictly liable for odometer disclosure statements that are true and complete to the best of its knowledge. Indeed, under the Tenth District's ruling, GMAC has been held strictly liable for odometer disclosure statements given to Midway, the actual wrongdoer, for those affected vehicles that were transferred back to Midway at lease end.⁵ That result is neither just nor reasonable.

Ignoring both the plain language of the statutes and the odometer disclosure affidavit form, as well as the legislative history, the Tenth District simply relied upon dicta in prior, non-Ohio Supreme Court precedent finding that O.R.C. § 4549.46 is a strict liability statute. Opinion at 7-9. This approach is unsupported by the plain language of the Odometer Act, as illustrated

⁵ When the leases of certain of those affected vehicles ended, Midway purchased those vehicles from GMAC, which is a common practice for dealers in the industry.

by the facts of this case. None of those courts addressed whether O.R.C. § 4549.46(A) incorporates the knowledge requirement contained in O.R.C. § 4505.06(C)(1), nor did they have to because the defendants' knowledge was an undeniable foregone conclusion inasmuch as they were the actual tamperers of the odometers. As a result, their strict liability analysis is pure, non-binding dicta. Additionally, none of them addressed whether a third-party lender and/or financial institution like GMAC -- which played no part whatsoever in the odometer tampering -- can be held liable under Ohio's Odometer Act. Thus, the cases cited by the Tenth District in support of its finding that O.R.C. § 4549.46(A) imposes strict liability are not controlling, and indeed, are inapposite to the situation before this Court.⁶ Lest future courts continue to rely on inapposite precedent when faced with the same or similar facts to those at issue here, this Court should take jurisdiction of this Appeal and provide guidance in this uncharted area.

Proposition of Law No. 2: Imposing strict liability on the basis of a State-issued and mandated odometer disclosure affidavit form that itself contains an express knowledge element violates due process, and amounts to entrapment.

Pursuant to O.R.C. § 4505.06(C)(1), the Registrar prescribed an odometer disclosure affidavit that undeniably contains an express, unambiguous knowledge element: "I (we) certify

⁶ Simply because other Ohio appellate courts, in glaringly distinguishable factual circumstances have applied O.R.C. § 4549.46(A) on a strict liability basis, does not require slavishly following such precedent:

Mere precedent alone is not sufficient to settle and establish forever a legal principle. Infallibility is to be conceded to no human tribunal. A legal principle, to be well settled, must be founded on sound reason, and tend to the purposes of justice.

State ex rel. Guilbert v. Lewis (1903), 69 Ohio St. 202, 207 (emphasis in original). This principle applies with added force when the facts of the present case differ from those that established the rule, for its creators may not have envisioned the injustice that would eventually result. Id. at 209 ("We are convinced that, if we follow [the precedent], we follow an erroneous decision into which the court fell, when the great importance of the question as it now presents itself could not be foreseen; and the subject did not therefore receive the deliberate consideration of the eminent men who presided here when that case was decided.") (emphasis added).

The lower courts and the Attorney General heavily relied upon Flint v. Ohio Bell Telephone Co., 2 Ohio App. 3d 136 (Ohio App. 1982) and its progeny. The Flint Court did not address whether O.R.C. § 4549.46 expressly incorporates the knowledge element of O.R.C. § 4505.06 and the odometer disclosure affidavit statutorily prescribed by the Registrar. Moreover, the defendant before the Flint Court knew the odometer reading was false when it gave the odometer disclosure. Thus, any discussion of whether knowledge is an element of an odometer disclosure violation is pure dicta.

to the best of my (our) knowledge that the odometer now reads □□□,□□□ miles and is the actual mileage of the vehicle unless one of the following statements is checked . . .” (emphasis added). In doing so, the Registrar, by way of its statutory authority, affirmatively notified all transferors of vehicles in Ohio that they would not be liable under the odometer laws so long as they gave disclosures that were to the best of their knowledge. Millions of cars have been transferred in Ohio with that understanding.

Enforcement efforts cannot undercut GMAC’s reliance on the statutorily-prescribed form, because to do so would result in an entrapment of GMAC. In broader terms, the State of Ohio cannot tell citizens in its mandatory odometer disclosure affidavit forms that vehicle transferors only have to sign the form to the best of their knowledge, only to take the “gotcha” position that lurking behind the State’s prescribed form is a strict liability statute waiting to trap the unwary.

Under Ohio law, “the defense of entrapment is established where the criminal design originates with officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order to prosecute.” State of Ohio v. Doran (1983), 5 Ohio St. 3d 187, Syllabus ¶ 2. According to the Tenth District’s ruling, a party may truthfully sign an odometer disclosure statement to the best of his or her knowledge, only to have the State seek civil penalties under a strict liability theory. In such a case, the State, through its misleading odometer disclosure affidavit form, is inducing the party to unwittingly make a “false” disclosure (one that is actually perfectly true according to the plain language of what the party signed, but “false” according to hidden strict liability standards contained nowhere on the affidavit), in order to later prosecute the party for violation of the hidden strict liability statute. Such entrapment violates GMAC’s fundamental due process rights.

Indeed, as the United States Supreme Court repeatedly has recognized, a state cannot be permitted to prosecute its citizens for engaging in conduct the state has previously expressly approved:

While there is no suggestion that the Commission had any intent to deceive the appellants, we repeat that to sustain the judgment of the Ohio Supreme Court on such a basis after the Commission had acted as it did would be to sanction the most indefensible sort of entrapment by the State – convicting a citizen for exercising a privilege which the State clearly had told him was available to him. A state may not issue commands to its citizens, under criminal sanctions, in language so vague and undefined as to afford no fair warning of what conduct might transgress them. Inexplicably contradictory commands in statutes ordaining criminal penalties have, in the same fashion, judicially been denied the force of criminal sanction.... We cannot hold that the Due Process Clause permits convictions to be obtained under such circumstances.

Raley v. Ohio (1959), 360 U.S. 423, 438-39 (emphasis added) (citation omitted).⁷

In concluding that “GMAC was not induced by the state of Ohio to set forth untrue odometer readings...” (Opinion at 10), the Tenth District failed to grasp the thrust of GMAC’s argument. GMAC was, in fact, induced to complete the state-mandated odometer disclosure affidavit form to the best of its knowledge. It does not matter whether the odometer reading ultimately turned out to be accurate or inaccurate. All that matters is whether the disclosure was made to the best of GMAC’s knowledge at the time of transfer. No one disputes that it was. The State entrapped GMAC by planting in its mind (and all other transferors in the State of Ohio) that it can comply with the law by setting forth an odometer reading and its reliability that are to the best of its knowledge only to later hold GMAC strictly liability if that reading unbeknownst

⁷ See also U.S. v. Cardiff (1952), 344 U.S. 174, 176-77 (“We cannot sanction taking a man by the heels for refusing to grant the permission which this Act on its face apparently gave him the right to withhold. That would be making an act criminal without fair and effective notice.”); U.S. v. Levin (6th Cir. 1992), 973 F.2d 463, 466-67 (relying on Raley to strike down government’s efforts to prosecute defendant for Medicare fraud where federal departments and agencies had previously approved defendant’s billing methods). Although these decisions addressed criminal sanctions, they apply with equal force to the case at hand. A.B. Small Co. v. American Sugar Refining Co. (1925), 267 U.S. 233, 239-40 (“The defendant attempts to distinguish those cases because they were criminal prosecutions. But that is not an adequate distinction. The ground or principle of the decisions was not such as to be applicable only to criminal prosecutions”).

to GMAC is not absolutely true.

Notably, the Attorney General never told the Registrar that the form it prescribed pursuant to its statutory authority did not comport with Ohio law. Indeed, the Registrar continues to use the same form today. The consequences of concluding that O.R.C. § 4549.46(A) creates strict liability (especially in these factual circumstances), while allowing the Registrar to promulgate misleading, compulsory affidavits, are enormous, implicating the due process rights of millions of vehicle sellers in Ohio and calling into question the validity of millions of odometer disclosure affidavits for each vehicle transfer in the State of Ohio.

Proposition of Law No. 3: The “previous owner” defense to a violation of O.R.C. § 4549.46(A) is available as long as the odometer tampering and/or rollback was perpetrated by “a previous owner,” regardless of whether such “a previous owner” was the owner of an affected vehicle at the time the odometer tampering and/or rollback occurred.

Under the express and unambiguous language of O.R.C. § 4549.46(A), GMAC cannot be liable for an inaccurate odometer reading where the inaccuracy was the result of a previous owner’s conduct:

No transferor shall fail to provide the true and complete odometer disclosures required by section 4505.06 of the Revised Code. The transferor of a motor vehicle is not in violation of this division requiring a true odometer reading if the odometer reading is incorrect due to a previous owner’s violation of any of the provisions contained in sections 4549.42 to 4549.46 of the Revised Code, unless the transferor knows of or recklessly disregards facts indicating the violation. (emphasis added).

It is undisputed that Midway was a **previous owner** of the vehicles at issue here. It is also undisputed that Midway, as a previous owner, rolled back and/or tampered with those vehicles. Indeed, GMAC never had physical possession of those vehicles. Finally, it is undisputed that at the time of their transfer, GMAC did not know, have reason to know, or disregard any facts that would have revealed the wrongful actions of previous owner Midway.

Notwithstanding the plain language of O.R.C. § 4549.46(A), and the fact that Midway is an undisputed previous owner, the Tenth District rejected this statutory safe harbor, reasoning that although the odometer rollbacks occurred while the vehicles were still in Midway's possession, the vehicles were titled to GMAC. This conclusion is wrong based on the plain language of O.R.C. § 4549.46(A). The statute simply refers to the conduct of "a previous owner." It contains no temporal element even suggesting that the "previous owner" had to own the vehicle at the time of rollback. Rather, it only requires the "previous owner" to be the perpetrator of the wrongdoing. Midway is the previous owner of all those vehicles and is certainly the wrongdoer. As such, the previous owner defense prescribed by O.R.C. § 4549.46(A) protects GMAC from liability under that statute.⁸ However, the Tenth District's ruling creates a new judicial exception to the statutory rule: the previous owner defense is not available to a victim of odometer rollbacks where such rollbacks were perpetrated by the previous owner while the victim was the owner of the vehicles. The statute contains no such language. This Court needs to speak to this clear misinterpretation of the statute and unjust result.

CONCLUSION

GMAC asks the Court to accept jurisdiction of this Appeal to (1) resolve an obvious conflict in the law in an area that affects any Ohio bank, finance company, or individual transferring a vehicle and completing the state-mandated odometer disclosure affidavit; (2) ensure that the due process rights of the citizens and companies doing business in the State of Ohio are protected; and (3) remedy the commercial chilling effects of the Tenth District's ruling.

⁸ See, e.g., Automanage, Inc. v. Beechmont Toyota, Inc. (Hamilton Sept. 2, 1992), No. C-910528, 1992 Ohio App. LEXIS 4464, *14-15 (holding that the transferor was not liable under O.R.C. § 4549.46 even though the transferor's odometer mileage statement falsely stated the actual mileage of the vehicle, because there was no evidence that the transferor knew the previous owner had violated the statute).

Respectfully Submitted,



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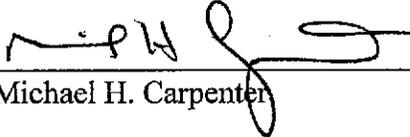
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Memorandum Of Defendant-Appellant
GMAC LLC In Support Of Jurisdiction was served, this 24th day of July, 2008, upon the
following via regular, U.S. mail:

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127-527:210809

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio ex rel. [Nancy H. Rogers],
Attorney General of Ohio,

Plaintiff-Appellee,

v.

Midway Motor Sales, Inc. et al.,

Defendants-Appellees,

(General Motors Acceptance Corporation
n/k/a GMAC LLC,

Defendant-Appellant).

No. 07AP-744
(C.P.C. No. 05CVH-00175)

(REGULAR CALENDAR)

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O P I N I O N

Rendered on June 10, 2008

Nancy H. Rogers, Attorney General, and David M. Dembinski,
for appellee.

Carpenter & Lipps LLP, Michael H. Carpenter, Jeffrey A.
Lipps and Angela M. Paul, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

McGRATH, P.J.

{¶1} Defendant-appellant, General Motors Acceptance Corporation ("GMAC"),
appeals from the judgment of the Franklin County Court of Common Pleas granting

EXHIBIT

A

summary judgment in favor of plaintiff-appellee State of Ohio ("appellee"), on count two of its complaint as well as on GMAC's counterclaim against appellee for abuse of process.

{¶2} Appellee initiated this action by filing a six count complaint against GMAC and Midway Motors Sales, Inc. ("Midway"), on a strict liability theory under the Ohio Odometer Rollback and Disclaimer Act ("Odometer Act"), codified in R.C. 4549.41, et seq., and the Consumer Sales Practices Act, codified in R.C. 1345.01, et seq. The underlying facts of this litigation are largely undisputed. Midway purchased vehicles from General Motors Corporation ("GM"), who issued the manufacturer's certificate of origin in Midway's name, thereby making Midway the first owner of the vehicles. Midway leased these vehicles to Modern Builders Supply, Inc. ("MBS"), pursuant to lease agreements with specific mileage limits.¹ Midway then assigned the lease agreements to GMAC, whereupon the vehicles were titled in GMAC's name. Midway and MBS, however, entered into separate lease arrangements allowing MBS greater mileage limits than those allowed in the lease agreements assigned to GMAC, which resulted in a number of vehicles having substantially more mileage than the 30,000 allowance. After the expiration of the leases, Midway retrieved the leased vehicles from MBS, then altered and/or rolled back their odometers.

{¶3} The vehicles were then sold to authorized dealers at dealer-only auctions. In the spring of 2004, GMAC discovered the odometer tampering scheme. Apparently, 85 vehicles had altered odometers, 72 of which were in the hands of retail customers.

¹ The typical mileage limit contained in the lease agreements was 30,000 miles.

GMAC implemented a remediation plan concerning the current owners of these vehicles.²

GMAC also reported the incident to the Ohio Attorney General.

{¶4} On January 6, 2005, the instant litigation was filed. GMAC filed an answer and a counterclaim for abuse of process. Midway did not file an answer, but did file a notice of filing bankruptcy in the United States Bankruptcy Court for the Northern District of Ohio. Thereafter, a default judgment was rendered against Midway, but the trial court did not award damages due to Midway's bankruptcy filing. The trial court did, however, impose a civil penalty of \$93,000, and permanently enjoined Midway from engaging in acts and practices described as violations of the Odometer Act and Consumer Sales Practices Act.

{¶5} On October 12, 2005, appellee filed a motion for partial summary judgment on its claim under the Odometer Act, and for summary judgment on GMAC's counterclaim for abuse of process. The trial court granted appellee's motion for both summary judgment on the counterclaim and partial summary judgment on appellee's complaint. The issue of damages was reserved pending a hearing. Thereafter, appellee dismissed the remaining counts in the complaint pursuant to Civ.R. 41(A). GMAC filed a motion for reconsideration that the trial court denied on May 23, 2007. On May 25, 2007, a damages hearing was held. On August 15, 2007, the trial court imposed a statutory fine against GMAC of \$1,000 per violation, and then suspended said fine.

{¶6} GMAC timely appeals and brings the following ten assignments of error for our review:

1. Because GMAC Provided Truthful Odometer Disclosures To The Best Of Its Knowledge As

² According to GMAC, \$1.2 million was paid to current owners of the altered-odometer vehicles.

Required By State Law, the Trial Court erred in Holding GMAC Strictly Liable For An Alleged Disclosure violation As A Matter Of Affirmative Summary Judgment.

2. The Trial Court Erred In Granting Affirmative Partial Summary Judgment Against GMAC On The Basis Of The State's Own Misleading Affidavit Form, Because That Form Amounts To Unconstitutional Entrapment.
3. The Trial Court Erred In Imposing Strict Liability On GMAC On The Basis Of What Amounted To Altered Evidence.
4. The Trial Court Was Not Entitled To Decide "Knowledge" As a Matter Of Law, Because "Knowledge" Is A Question Of Fact Precluding Summary Judgment.
5. The Trial Court Erred In Granting Affirmative Partial Summary Judgment Against GMAC Under O.R.C. § 4549.46(A) Because GMAC Cannot Be Liable For The Acts Of A Previous Owner.
6. The Trial Court Erred In Holding That GMAC Should Be Liable For Unknowingly Making Allegedly False Odometer Disclosures To Midway, The Wrongdoer Who Engaged In Secret Odometer Tampering; Principles Of Equity An Fairness Preclude Such A Finding.
7. The Trial Court Erred In Denying GMAC's Motion for Reconsideration Of The Affirmative Partial Summary Judgment Decision On Liability.
8. The Trial Court Erred in Granting Summary Judgment Against GMAC On Its Counterclaim For Abuse Of Process, Because Genuine Issues Of Material Fact Exist.
9. The Trial Court Erred In Refusing GMAC's Constitutional Right To A Jury Trial.

10. The Trial Court Erred In Imposing A Statutory Penalty Of \$1,000 Per Violation Of O.R.C. § 4549.46(A) Because Not A Single Violation Was Established.

{¶7} This matter was decided in the trial court by summary judgment, which under Civ.R. 56(C) may be granted only when there remains no genuine issue of material fact, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to but one conclusion, that conclusion being adverse to the party opposing the motion. *Tokles & Son, Inc. v. Midwestern Indemn. Co.* (1992), 65 Ohio St.3d 621, 629, citing *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64. Additionally, a moving party cannot discharge its burden under Civ.R. 56 simply by making conclusory assertions that the nonmoving party has no evidence to prove its case. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. Rather, the moving party must point to some evidence that affirmatively demonstrates that the nonmoving party has no evidence to support his or her claims. *Id.*

{¶8} An appellate court's review of summary judgment is *de novo*. *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588; *Patsy Bard v. Society Nat. Bank, nka KeyBank* (Sept. 10, 1998), Franklin App. No. 97APE11-1497. Thus, we conduct an independent review of the record and stand in the shoes of the trial court. *Jones v. Shelly Co.* (1995), 106 Ohio App.3d 440, 445. As such, we must affirm the trial court's judgment if any of the grounds raised by the movant at the trial court are found to support it, even if the trial court failed to consider those grounds. See *Dresher, supra*; *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41-42.

{¶9} One of the core issues in this case is whether or not R.C. 4549.46 holds transferors who fail to disclose the true mileage of a vehicle strictly liable for their conduct.

R.C. 4549.46 was amended in 1987. Prior to its amendment, R.C. 4549.46 provided, in part:

No person shall fail to provide the true odometer disclosures required by section 4505.06 of the Revised Code. The transferor of a motor vehicle is not in violation of this section's provisions requiring a true odometer reading if the odometer reading is incorrect due to a previous owner's violation of any of the provisions contained in sections 4549.42 to 4549.46 of the Revised Code, unless the transferor knows of the violation.

{¶10} The statute incorporated by reference R.C. 4505.06(C), which required:

"The registrar shall prescribe an affidavit in which the transferor shall swear to or affirm the true selling price and odometer reading of the motor vehicle. * * * "

Flint v. The Ohio Bell Tel. Co. (1982), 2 Ohio App.3d 136.

{¶11} The leading case interpreting the Odometer Act as it existed prior to 1987 was *Flint*, supra, wherein the plaintiff bought a van in which the seller executed an odometer mileage statement and affidavit stating that the vehicle had an actual mileage of 18,483, when, in fact, the vehicle had an actual mileage of 118,483. The seller argued the Odometer Act, when read in conjunction with R.C. 2901.21, required a showing of recklessness by the defendant. The *Flint* court disagreed, noting that R.C. 4549.42 through 4549.46 each specified a culpable mental element, though R.C. 4549.46 did not. Thus, the *Flint* court held R.C. 4549.46 imposed strict liability on those who transfer a vehicle and fail to disclose the true mileage. See, also, *Baker v. Hurst Buick* (May 2, 1988), Warren App. No. CA86-08-054 (proof of a statutory violation is sufficient to impose liability); *Baek v. Cincinnati* (1988), 43 Ohio App.3d 158 (holding that R.C. 4549.46 holds

a transferor strictly liable for a violation of its provision without regard to intent or knowledge).

{¶12} In 1987, R.C. 4549.46 was amended, and now provides:

(A) No transferor shall fail to provide the true and complete odometer disclosures required by section 4505.06 of the Revised Code. The transferor of a motor vehicle is not in violation of this division requiring a true odometer reading if the odometer reading is incorrect due to a previous owner's violation of any of the provisions contained in sections 4549.42 to 4549.46 of the Revised Code, unless the transferor knows of or recklessly disregards facts indicating the violation.

{¶13} R.C. 4549.46 again incorporates by reference the requirement of R.C. 4505.06, and there were no changes to the statute to indicate the legislature's intent to alter the strict liability nature of the Odometer Act. In fact, the strict liability aspect of this statute since 1987 has been recognized by a number of Ohio courts, including ours, in *Hubbard v. Bob McDorman Chevrolet* (1995), 104 Ohio App.3d 621. In *Hubbard*, the seller of a transferred vehicle represented the true and actual mileage of the vehicle as 62,779, when, in fact, the odometer read 63,097 miles. The buyer of the vehicle filed a complaint under the Odometer Act and was granted summary judgment in her favor. In discussing the federal counterpart to Ohio's Odometer Act, this court noted that unlike the Ohio statute, the federal statute does not impose strict liability. Because "a prior owner's violation" was not involved and the "discrepancy occurred while the vehicle was in the possession of the [seller]," this court held the first sentence of R.C. 4549.46, imposing strict liability applied. *Falasco v. Bishop Motors, Inc.* (Nov. 7, 1990), Summit App. No. 14637 (holding R.C. 4549.46 imposes strict liability); *Hughes v. Miller* (1991), 72 Ohio App.3d 633 (finding that unless disclosed strict liability under R.C. 4549.46 applies to a

transferor when a discrepancy in the odometer reading occurs during their ownership of the vehicles); *Moon v. Miller* (1991), 77 Ohio App.3d 157 (noting that although R.C. 4549.46 establishes a strict liability crime, it also contains a defense in the second sentence); *Ragland v. Dumm* (Oct. 15, 1993), Ross App. No. 92CA1915 (noting the strict liability nature of R.C. 4549.46); *Triplett v. Voros* (1996), 114 Ohio App.3d 268 (it is no defense to the strict liability nature of R.C. 4549.46 that the transferee had knowledge of an incorrect odometer reading); *Harrell v. Talley*, Athens App. No. 06CA41, 2007-Ohio-3784 (the first sentence of R.C. 4549.46 imposes strict liability); *Noble v. Atomic Auto Sales, Inc.*, Cuyahoga App. No. 89431, 2008-Ohio-233 (R.C. 4549.46 imposes strict liability on transferors who violate its provisions).

{¶14} Despite the plethora of cases interpreting R.C. 4549.46(A) as a strict liability statute, GMAC argues it is not so because the state's odometer disclosure affidavit form contains "an express knowledge element on its face." (Appellant's brief, at 11.) GMAC's argument stems from the Ohio Title with Odometer Disclosure Affidavit that states:

I (we) certify to the best of my (our) knowledge that the odometer now reads _ _ _ , _ _ _ miles and is the actual mileage of the vehicle unless one of the following statements is checked * * *.

{¶15} Because R.C. 4549.46(A) incorporates 4505.06(C)(1), which provides, in part, that the "registrar shall prescribe an affidavit in which the transferor shall swear to the true selling price and, except as provided in this division, the true odometer reading of the motor vehicle[,]" GMAC contends a knowledge component is incorporated into the statute. According to GMAC, the Ohio legislature "never intended" the outcome derived at by the trial court, and that if the legislature believed the odometer disclosure affidavit

was deficient, it could have enacted legislation to address it. (Appellant's brief, at 14-15.) However, it is equally arguable that if the legislature did not intend for R.C. 4549.46 to operate as a strict liability statute, it would have amended said provision, especially in light of judicial interpretation of the statute, both before and after its amendment in 1987, as a strict liability statute.

{¶16} It is also noteworthy that the incorporation of R.C. 4505.06 has been in the statute throughout its course of litigation in Ohio courts. In fact, the language in the affidavit at issue here has also been in use both before and after the 1987 amendment of R.C. 4549.46. *Ryan v. Matthews Ford Sandusky* (Oct. 17, 1986), Erie App. No. E-86-14; *Falasco, supra*; *TCT Ins. v. Moore* (June 17, 1991), Clermont App. No. CA90-12-111; *Ormston v. Leikin Oldsmobile, Inc.* (Dec. 20, 1991), Lake App. No. 91-L-005; *Stormont v. Tenn-River Trading Co.* (Apr. 27, 1995), Franklin App. No. 94APG08-1272.

{¶17} Given the precedent from this and various other Ohio courts, we are not persuaded by GMAC's arguments that R.C. 4549.46 is not a strict liability statute. In light of the precedential history surrounding R.C. 4549.46, if such statutory interpretation is misguided, we opine the resolution rests with a higher court of law or the legislature. Accordingly, we overrule GMAC's first assignment of error.

{¶18} In its second assignment of error, GMAC argues imposing strict liability in this instance amounts to entrapment. GMAC contends by prescribing an odometer disclosure affidavit with a knowledge requirement, the Ohio Registrar put persons on notice that there is no liability under the odometer laws so long as the disclosures are to the best of their knowledge. In other words, according to GMAC, the state of Ohio is

inducing parties to unwittingly make a "false" disclosure, in order to later prosecute the party for a violation of the "hidden strict liability statute." (Appellant's brief, at 21.)

{¶19} The defense of entrapment is established where the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order to prosecute. *State v. Italiano* (1985), 18 Ohio St.3d 38, 42. The statute, R.C. 4549.46(A), however, imposes liability on transferors of motor vehicles when they fail to provide true and complete disclosures regardless of their knowledge of any inaccuracy. The Ohio Registrar's affidavit does not change the language or requirement of R.C. 4505.06 that a transferor shall swear to the true odometer reading of the motor vehicle. While the state of Ohio required that GMAC use its forms to effect the transfers at issue, GMAC was not induced by the state of Ohio to set forth untrue odometer readings, and as explained above, it matters not of GMAC's knowledge of the same. Therefore, we find no merit to GMAC's argument with respect to entrapment. Accordingly, we overrule GMAC's second assignment of error.

{¶20} In its third assignment of error, GMAC argues that to impose strict liability here, appellee is in effect removing the "to the best of my knowledge" language from the Ohio Registrar's affidavit, and is thereby altering evidence.

{¶21} This argument, however, really is a reiteration of that argued in the first assignment of error. Given our disposition of GMAC's first assignment of error, that, despite the form used by the registrar, R.C. 4549.46 is a strict liability statute, we are not persuaded that such interpretation in effect "alters evidence" in this case, or that evidence

has to be altered to reach that conclusion. Accordingly, we overrule GMAC's third assignment of error.

{¶22} In its fourth assignment of error, GMAC argues that since R.C. 4549.46(A) incorporates a knowledge element, it was error for the trial court to grant summary judgment in favor of appellee where there was no evidence presented establishing the "essential element of knowledge." (Appellant's brief, at 24.) Again, however, on the basis of our disposition of GMAC's first assignment of error, we find this contention lacks merit. Knowledge is not part of the determination under the first sentence of R.C. 4549.46(A), which imposes strict liability on a transferor of a motor vehicle for failing to provide true and complete odometer disclosures as required by R.C. 4505.06. Accordingly, we overrule GMAC's fourth assignment of error.

{¶23} In its fifth assignment of error, GMAC argues the granting of partial summary judgment in favor of appellee was improper as GMAC cannot be liable for the acts of a previous owner. As discussed previously, R.C. 4549.46(A) states in relevant part:

No transferor shall fail to provide the true and complete odometer disclosures required by section 4505.06 of the Revised Code. The transferor of a motor vehicle is not in violation of this division requiring a true odometer reading if the odometer reading is incorrect due to a previous owner's violation of any of the provisions contained in sections 4549.42 to 4549.46 of the Revised Code, unless the transferor knows of or recklessly disregards facts indicating the violation.

{¶24} According to GMAC, facts are present here to trigger the second sentence of R.C. 4549.46, and provide an exception to strict liability because Midway, a previous owner, was undisputedly responsible for the odometer alterations, and GMAC had no

knowledge of Midway's actions. In contrast, appellee contends the second sentence is inapplicable because the odometer discrepancies occurred during GMAC's ownership of the affected vehicles.

{¶25} If we were to accept GMAC's position, however, an anomalous result would occur as exemplified in the following scenario. Assume A is a transferor, B is a prior owner, C is an outside party, and D is a transferee. Unbeknownst to A, C, an outside party such as one performing maintenance of A's vehicle, alters the odometer of A's vehicle during A's ownership. A then transfers the vehicle with an odometer disclosure, such as the one at issue here, to D. A would be strictly liable for failing to provide a true odometer reading pursuant to R.C. 4549.46. However, if B, a prior owner, had performed the same act as C, i.e., altering the odometer during A's ownership of the vehicle, A would not be subject to strict liability pursuant to R.C. 4549.46. These anomalous results would occur despite the fact that in either instance the alteration of the odometer occurred during A's ownership and without A's knowledge.

{¶26} We agree with GMAC's proposition that when interpreting legislation, courts must give the words their plain and ordinary meaning. However, we cannot find that the legislature intended the divergent results that would occur if R.C. 4549.46 were applied as GMAC desires in this case. It is anomalous to think the legislature would intend a result such that a transferor is absolved of strict liability in one instance, i.e., where a prior owner altered an odometer, but not in another, i.e., where a third party altered an odometer, even though in either scenario the act took place during the transferor's ownership. We find the trial court's interpretation, that the second sentence of R.C. 4549.46 is triggered

when facts suggest an act occurred prior to the transferor's ownership of a vehicle is the one that satisfies logic and does not result in an unreasonable interpretation.

{¶27} We also note, as did the trial court, the statements from *Hughes*, supra, are demonstrative. In *Hughes*, the court stated:

Strict liability under R.C. 4549.46 applies to a transferor when a discrepancy in the odometer reading *occurs during their ownership* of the vehicle, unless the transferor properly discloses the discrepancy upon transfer. * * * The second sentence of R.C. 4549.46 places liability only on the transferor of a vehicle which has not had its odometer tampered with during his ownership, but the transferor nevertheless has actual knowledge of tampering with, or discrepancy in, the odometer reading.

Id. (Emphasis added.)

{¶28} Admittedly, the court in *Hughes* did not have the same factual scenario presented herein. Nonetheless, we find the court's explicit reference to strict liability under R.C. 4549.46 attaching when a discrepancy in an odometer reading occurs during the ownership of the transferor, adds further support to our interpretation of R.C. 4549.46.

{¶29} Accordingly, we overrule GMAC's fifth assignment of error.

{¶30} In its sixth assignment of error, GMAC argues principles of equity and fairness preclude the trial court's finding that GMAC is strictly liable for those odometer disclosures made on vehicles transferred from GMAC to Midway, the entity responsible for the odometer alterations.³ We have already determined that GMAC's knowledge is irrelevant for purposes of strict liability here. Further, as held by the court in *Triplett*, supra:

It is no defense that the transferee had knowledge that the odometer reading was incorrect. *Baek v. Cincinnati* (1988), 43

³ Some of the affected vehicles were actually sold to Midway at the conclusion of the lease operations

Ohio App. 3d 158, 161, 539 N.E.2d 1149. Whether Triplett knew that the odometer was not accurate, or whether she even told Voros not to disclose the true mileage is not relevant to Voros's liability under R.C. 4549.46. The public at large has a substantial interest in preventing inaccurate odometers from entering the stream of commerce. *Flint*, supra.

Id. at 270. (Footnote omitted.)

{¶31} Accordingly, we overrule GMAC's sixth assignment of error.

{¶32} In its seventh assignment of error, GMAC argues the trial court erred in overruling its motion for reconsideration of the trial court's decision granting partial summary judgment in favor of appellee. For the reasons stated in our disposition of GMAC's previous assignments of error, we overrule GMAC's seventh assignment of error.

{¶33} In its eighth assignment of error, GMAC argues the trial court erred in granting summary judgment in favor of appellee on GMAC's counterclaim for abuse of process of the authority granted by the Odometer Act and the Consumer Sales Practices Act. According to GMAC, there exists genuine issues of material fact on this issue that precluded the grant of summary judgment.

{¶34} "In order to establish a claim of abuse of process, a plaintiff must satisfy three elements: '(1) that a legal proceeding has been set in motion in proper form and with probable cause; (2) that the proceeding has been perverted to attempt to accomplish an ulterior purpose for which it was not designed; and (3) that direct damage has resulted from the wrongful use of process.'" *Robb v. Chagrin Lagoons Yacht Club* (1996), 75 Ohio St.3d 264, 271, quoting *Yaklevich v. Kemp, Schaeffer & Rowe Co., L.P.A.* (1994), 68 Ohio St.3d 294, 298. "The key consideration in an abuse of process action is whether

an improper purpose was sought to be achieved by the use of a lawfully brought previous action." *Yaklevich*, at 300.

{¶35} We have already determined in our disposition of GMAC's previous assignments of error that strict liability under R.C. 4549.46 is applicable in this instance. Further, despite GMAC's arguments to the contrary, we find no evidence that appellee attempted to pervert the proceedings to accomplish an "ulterior purpose" for which it was not designed. It is also worth noting that appellee did not initiate this action against GMAC alone, but also initiated this action against Midway as well.

{¶36} Accordingly, finding no evidence to support GMAC's abuse of process claims, we overrule GMAC's eighth assignment of error.

{¶37} In its ninth assignment of error, GMAC contends the trial court erred in striking its demand for a jury trial. We find this issue rendered moot. We have decided that rendering summary judgment in favor of appellee on its claim pursuant to the Odometer Act was appropriate, thereby eliminating the necessity of a trial of any sort. Further, as previously indicated, appellee dismissed its remaining claims pursuant to Civ.R. 41(A). "An appellate court is not required to render an advisory opinion on a moot question or to rule on a question of law that cannot affect matters at issue in a case." *VanMeter v. VanMeter*, Franklin App. No. 03AP-1107, 2004-Ohio-3390, citing *Saffold v. Saffold* (May 13, 1999), Cuyahoga App. No. 72937. " 'Actions become moot when resolution of the issues presented is purely academic and will have no practical effect on the legal relations between the parties.' " *VanMeter*, at ¶5, quoting *Saffold*. Accordingly, we overrule GMAC's ninth assignment of error as moot.

{¶38} In its final assignment of error, GMAC argues the trial court erred in imposing a statutory penalty of \$1,000 per violation of R.C. 4549.46 because not a single violation was established. R.C. 4549.48(B) provides:

In addition to the remedies otherwise provided by this section, the attorney general may request and the court shall impose a civil penalty of not less than one thousand nor more than two thousand dollars for each violation. A violation of any provision of sections 4549.41 to 4549.46 of the Revised Code shall, for purposes of this section, constitute a separate violation with respect to each motor vehicle or unlawful device involved, except that the maximum civil penalty shall not exceed one hundred thousand dollars for any related series of violations by a person. Civil penalties ordered pursuant to this division shall be paid as follows: one-fourth of the amount to the treasurer of the county in which the action is brought; three-fourths to the consumer protection enforcement fund created by section 1345.51 of the Revised Code.

{¶39} In the case at bar, appellee requested civil penalties. It is undisputed that the vehicles at issue were transferred in Ohio by GMAC with odometer disclosure statements that failed to state the true and actual mileage of the vehicles. To this extent, GMAC has not disputed this, but, rather, has vehemently argued it was not aware of the odometer alterations. Though GMAC states appreciation for the trial court's suspension of the statutory penalties imposed, GMAC argues the penalties should not have been imposed at all. However, as we have already concluded, strict liability under R.C. 4549.46 applies, and as set forth in R.C. 4549.48, the court, if requested, *shall* impose a civil penalty of not less than \$1,000 per violation.

{¶40} Based on R.C. 4549.48 and *State ex rel. Celebrezze v. Christopher* (Aug. 28, 1992), Mahoning App. No. 91 C.A. 69, the trial court imposed a civil penalty of \$1,000 per violation then suspended the same. In *Christopher*, the issue presented was

whether the trial court when imposing a civil penalty pursuant to R.C. 4549.48 has the power and discretion to suspend the fine in the form of a civil penalty that he previously imposed. The *Christopher* court, relying on language contained in *Celebrezze v. Hughes* (1985), 18 Ohio St.3d 71, concluded that "the authority and the control as to whether or not the penalty should be suspended lies within the power of the trial court." In *Hughes*, the Supreme Court of Ohio instructed that consumer protection acts, such as the Odometer Act must be interpreted in a manner calculated to provide courts with flexibility in fashioning remedies.

{¶41} Based on the preceding discussion, we find no error in the trial court's imposition of a statutory fine and subsequent suspension of the same. Accordingly, we overrule GMAC's tenth assignment of error.

{¶42} For the foregoing reasons, GMAC's ten assignments of error are overruled and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

BROWN, J., concurs.

FRENCH, J., concurs separately.

FRENCH, J., concurring separately.

{¶43} Based on this court's opinion in *Hubbard v. Bob McDorman Chevrolet* (1995), 104 Ohio App.3d 621, and principles of stare decisis, I concur in the foregoing opinion.

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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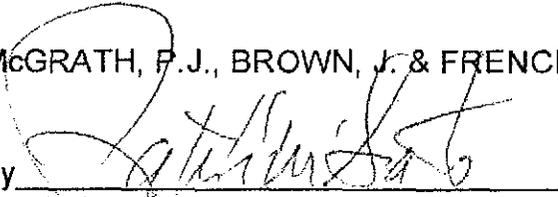
State of Ohio ex rel. [Nancy H. Rogers], :
Attorney General of Ohio, :
 :
Plaintiff-Appellee, :
 :
v. :
 :
Midway Motor Sales, Inc. et al., :
 :
Defendants-Appellees, :
 :
(General Motors Acceptance Corporation :
n/k/a GMAC LLC, :
 :
Defendant-Appellant). :

No. 07AP-744
(C.P.C. No. 05CVH-00175)

(REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the opinion of this court rendered herein on June 10, appellant's ten assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs shall be assessed against appellant.

McGRATH, P.J., BROWN, J. & FRENCH, J.
By 
Judge Patrick M. McGrath, P.J.

