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## STATEMENT OF THE CASE

GMAC was an innocent victim of Midway Motor Sales, Inc.'s ("Midway") odometer tampering fraud. That is undisputed. GMAC uncovered Midway's fraud, reported it to the Ohio Attorney General ("Attorney General"), and fully cooperated with the Attorney General by giving him documentary evidence of Midway's fraud and making GMAC employees available for him to interview to address the fraud. That is also undisputed. GMAC located co-victims of Midway's fraud -- innocent vehicle purchasers -- and made them whole, paying out approximately \$1.2 million to them in the process. That is also undisputed.

Nonetheless, on January 6, 2005, the Attorney General filed this lawsuit against GMAC. In this action, the Attorney General wrongly misapplied the Ohio statute regarding odometer disclosure to GMAC, an out-of-possession finance company that truthfully disclosed the mileage of leased vehicles to the best of its knowledge pursuant to the State of Ohio's own mandated form of title affidavit. That is the disputed wrong this Honorable Court needs to remedy in this matter.

Through this Appeal, this Court has the opportunity to assure finance companies, like GMAC, doing business in the State of Ohio, and all Ohio citizens, that the words of Ohio's statutes, and the vehicle title forms promulgated pursuant to them, have meaning and will be upheld. By adopting the Propositions of Law proposed by GMAC, this Court will be doing what the Legislature and the Ohio Registrar of Motor Vehicles ("Registrar") clearly stated should occur under the facts of this case.

Specifically, the mandatory odometer disclosure affidavit statutorily promulgated by the Registrar requires a knowledge-based certification of (1) the physical odometer reading appearing on a vehicle being transferred and (2) the reliability of that odometer reading. It is

undisputed that GMAC, as a vehicle lessor, truthfully completed that affidavit to the best of its knowledge, as required by the form prescribed by the Registrar. GMAC's affidavits were true, as Appellee, the Attorney General, readily admits and as was recognized in the lower courts. Under the current statutory framework governing odometer disclosure and the Attorney General's admissions in this case, there was simply no legal basis for finding GMAC committed a violation of the Ohio odometer disclosure statute. Yet, the lower courts held GMAC strictly liable for giving true and complete odometer disclosures with no reconciliation of the knowledge element in the state's odometer disclosure affidavit.

First, on May 30, 2006, the trial court granted affirmative summary judgment against GMAC. On August 15, 2007, the trial court awarded the Attorney General \$1,000 per violation in civil penalties, but suspended payment of any such civil penalties.

Next, having wrongly been found strictly liable under O.R.C. § 4549.46(A) for violating the odometer disclosure statute, GMAC appealed to the Tenth District Court of Appeals ("Tenth District") on September 12, 2007. The principal issue on appeal below was that the odometer disclosure statute, O.R.C. § 4549.46(A), incorporates and implicates an express knowledge element that precludes a strict liability interpretation of it. Specifically, the express language of the odometer disclosure statute, O.R.C. § 4549.46(A), refers to and incorporates by reference O.R.C. § 4505.06(C)(1), which requires the Registrar to promulgate the affidavit form for odometer disclosure statements. The Registrar's affidavit form requires the transferor to make disclosures "to the best of my (our) knowledge". Even though not a single Ohio court had considered the affidavit's "to the best of my (our) knowledge" language as applied to an innocent finance company victim like GMAC, making the issue one of first impression, the Tenth District relied upon the same distinguishable cases as the trial court to affirm the latter's

ruling. In its opinion of June 10, 2008, the Tenth District clearly recognized, but failed 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. There is a clear conflict between the statutory language and the lower court case law that needs to be resolved by this Court. The Tenth District so indicated in its decision.

As such, on July 24, 2008, GMAC timely filed its Memorandum In Support Of Jurisdiction. And, on October 15, 2008, this Court accepted jurisdiction.

To find GMAC strictly liable under O.R.C. § 4549.46(A) under the circumstances of this case, the Attorney General essentially convinced the lower courts to alter GMAC's truthful odometer disclosure affidavits after-the-fact to strike the "to the best of my (our) knowledge" language. That is alteration and ignorance of exculpatory evidence. This cannot be tolerated or implicitly condoned.

The June 10, 2008 ruling of the Tenth District has implications that go beyond just the strict liability imposed on GMAC. Indeed, this ruling affects not only finance companies like GMAC and other businesses operating in Ohio, but also innocent, ordinary consumers who trustingly sign the state-mandated odometer disclosure affidavit "to the best of [their] knowledge." In its reliance on distinguishable precedent, the Tenth District has perpetuated the errors in earlier decisions, leaving GMAC -- and all vehicle transferors in Ohio -- in a no-win situation. Even though GMAC, as an innocent transferor, uncovered the odometer rollbacks perpetrated by Midway, reported that misconduct to the Attorney General, and spent over \$1.2 million remediating the owners of affected vehicles, it has been placed in the unfair position of defending a lawsuit seeking to hold it strictly liable just for truthfully complying with Ohio law.

Not only did the Tenth District erroneously apply the law in the manner described above, it also failed to give effect to the language of O.R.C. § 4549.46(A) that absolves a transferor of any liability for an inaccurate odometer reading where the inaccuracy was the result of a previous owner's conduct. Even though there is absolutely no dispute that Midway was a previous owner of the affected vehicles, and was the party responsible for the odometer inaccuracies, the Tenth District refused to give effect to the express and unambiguous language of O.R.C. § 4549.46(A). Thus, GMAC is asking this Court to make clear that the "previous owner" defense cannot be judicially ignored, altered or written out of the statute.

For the reasons discussed below, this Court has ample and compelling legal basis to adopt the Propositions of Law advanced by GMAC. In the process, this Court will reassure businesses and private citizens alike that when they transfer a vehicle and truthfully identify the mileage on their odometer and its reliability "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 for the concealed sins of a previous owner. The Attorney General should join GMAC in urging this Court to correct the anomalous statutory trap the State of Ohio has created for its citizens and others who do business in Ohio.

#### **STATEMENT OF THE FACTS**

As the Tenth District recognized (Appx. A-6 to A-7), the underlying facts of this litigation are undisputed. They are as follows:

**A. As A Previous Owner Of The Affected Vehicles, Midway Rolled Back And/Or Tampered With The Odometers Of Those Vehicles.**

Midway purchased vehicles from non-party General Motors Corporation ("GM") to offer for sale and/or lease at its dealership location near Youngstown, Ohio. (Galvin Affidavit, Ex. 4

at ¶ 2; Supp. 001-02; Bhama Deposition Transcript (“Tr.”), Ex. 5 at 6; Supp. 010.)<sup>1</sup> GM issued the manufacturer’s certificate of origin in Midway’s name, making Midway the first owner of those vehicles. Midway thereafter leased numerous vehicles it then owned to non-party Modern Builders Supply, Inc. (“Modern”) under lease agreements that contained specific mileage limits. (Bhama Tr., Ex. 5 at 14; Supp. 013; GMAC’s Responses To First Set Of Requests For Admissions (“GMAC RFA Responses”), Ex. 6 at No. 2; Supp. 030-31.) Typically, those lease agreements had mileage limits of 30,000 miles. (Exemplar GMAC Smart Lease Agreement, Ex. 7; Supp. 039; Bhama Tr., Ex. 5 at 17; Supp. 014.) 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 Lease Plan Dealer Agreement, Ex. 8; Supp. 042; Bhama Tr., Ex. 5 at 12-14, 38; Supp. 011-13, 027; Galvin Affid., Ex. 4 at ¶ 3; Supp. 002.)

Unbeknownst to GMAC at the time, Midway and Modern entered into separate and secret lease arrangements allowing Modern significantly greater mileage limits than allowed under the lease agreements assigned to GMAC. (Vehicle Lease Service Agreement, Ex. 9; Supp. 044; Investigative Report of Interview of Taylor Evans of Modern, Ex. 10; Supp. 048.) At lease end, a number of the vehicles leased by Modern generally had substantially more mileage on them than the 30,000-mileage allowance provided under the lease agreements assigned to GMAC. And, at lease end, Midway retrieved the leased vehicles from Modern’s premises and, without GMAC’s knowledge, participation, or consent, then altered and/or rolled back their odometers in order to conceal the excess mileage from GMAC. (Bhama Tr., Ex. 5 at 17, 21;

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<sup>1</sup> The record references are to the exhibits (Ex.) submitted to the trial court in support of GMAC’s November 7, 2005 Memorandum in Opposition to Motion for Partial Summary Judgment and included in the Appendix filed with the Court of Appeals. Pursuant to S. Ct. Prac. R. VII, these portions of the record are included in GMAC’s Supplement (“Supp.”).

Supp. 014-15; GMAC RFA Responses, Ex. 6 at No. 1; Supp. 029-30.) The Affected Vehicles were never in the physical possession of GMAC. (Bhama Tr., Ex. 5 at 17; Supp. 014; Galvin Affid., Ex. 4 at ¶ 6; Supp. 002: GMAC RFA Responses, Ex. 6 at No. 1; Supp. 029-30; Attorney General RFA Responses, Ex. 11 at No. 22; Supp. 056.)

**B. GMAC, Having No Knowledge Or Notice Of Midway's Conduct, Truthfully Completed The Odometer Disclosure Affidavit Prescribed By The State.**

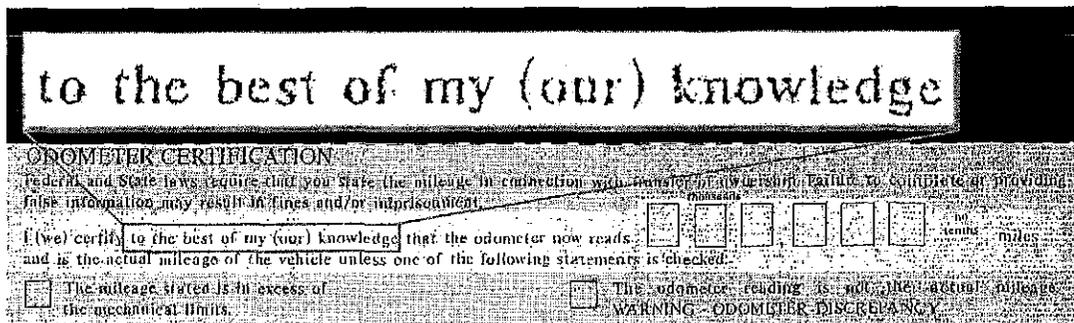
Significantly, the Attorney General admits there is no evidence whatsoever that GMAC had any knowledge of, or involvement in, the odometer tampering and fraud perpetrated by Midway. (Attorney General RFA Responses, Ex. 11 at Nos. 6 and 9; Supp. 052-53; Laverty Tr., Ex. 12 at 165-67; Supp. 098-100; Lombardo Tr., Ex. 13 at 56-57, 134; Supp. 116-17, 136.) The Attorney General admits the Record evidence establishes that Midway, a previous owner of the Affected Vehicles,<sup>2</sup> rolled back and/or altered the odometers. (Attorney General Amended RFA Responses, Ex. 14 at Nos. 19-20; Supp. 141; GMAC RFA Responses, Ex. 6 at No. 1; Supp. 029-030; Exemplar Vehicle Title History, Ex. 15; Supp. 144.) The Tenth District also recognized that it was Midway that rolled back the odometers. (Appx. A-6.)

The Attorney General admits that, without any notice or knowledge of the odometer tampering and fraud perpetrated by Midway, GMAC sold the Affected Vehicles to authorized dealers at dealer-only auctions in 2004. (Attorney General Amended RFA Responses, Ex. 14 at Nos. 7-8, 35, 38; Supp. 140, 142; Attorney General RFA Responses, Ex. 11 at Nos. 36-37; Supp. 060.) For each of the Affected Vehicles transferred at auction following Midway's odometer tampering, GMAC truthfully completed the Registrar's prescribed form of odometer disclosure

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<sup>2</sup> It is undisputed that Midway is a "previous owner" of the Affected Vehicles, which status is controlling to GMAC's "previous owner" defense under O.R.C. § 4549.46(A). Sheila Laverty, the Investigator for the Attorney General, testified at her deposition that Midway is a previous owner of the Affected Vehicles. (Laverty Tr., Ex. 12 at 127-38, 165-67; Supp. 083-94; see also Lombardo Tr., Ex. 13 at 72-74; Supp. 120-22.)

affidavit. This affidavit form expressly and unambiguously states that the odometer disclosure shall be based upon the transferor's knowledge:



(Excerpt from Blank Ohio Title with Odometer Disclosure Affidavit, Ex. 23; Supp. 153.) The affidavit form filled out by GMAC to the best of its knowledge is a mandatory form, prescribed by the State of Ohio through the Registrar. Everyone who transfers a vehicle in Ohio must fill out the prescribed form.

**C. Upon Uncovering Midway's Fraudulent Conduct, GMAC Reported The Situation To The Attorney General, Only To Be Sued For Its Efforts.**

In the spring of 2004, after most of the vehicles were transferred at auction, GMAC uncovered the odometer tampering and fraud perpetrated by Midway while reviewing vehicle records received from Modern. (Bhama Tr., Ex. 5 at 21; Supp. 015; Galvin Affid., Ex. 4 at ¶ 8; Supp. 003; GMAC Answers to First Set of Interrogatories, Ex. 17 at No. 10; Supp. 163-64; GMAC RFA Responses, Ex. 6 at No. 11; Supp. 036-37.) GMAC then investigated those discrepancies and ultimately discovered that approximately 85 vehicles had altered odometers, 72 of which were in the hands of retail customers. (Id.; Laverty Tr., Ex. 12 at 36; Supp. 070.)

GMAC timely reported the situation to the Attorney General and advised of Midway's fraudulent conduct. This is admitted. (Attorney General RFA Responses, Ex. 11 at Nos. 1-3; Supp. 051; Lombardo Tr., Ex. 13 at 15-16, 20-21; Supp. 106-09.) Prior to GMAC reporting the situation, the Attorney General did not know about Midway's odometer tampering and fraud.

Even after Midway's odometer tampering and fraud became more public, the Attorney General received no complaints about GMAC in connection with the Affected Vehicles. (Lavery Tr., Ex. 12 at 130; Supp. 086.) 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. (Bhama Tr., Ex. 5 at 27; Supp. 019; Galvin Affid., Ex. 4 at ¶ 9; Supp. 003; Lombardo Tr., Ex. 13 at 44; Supp. 115.)

GMAC also developed and implemented a remediation plan to identify, locate, and remediate the current owners of the Affected Vehicles. (Galvin Affid., Ex. 4 at ¶ 9; Supp. 003; Bhama Tr., Ex. 5 at 32-35; Supp. 022-25.) Upon learning of GMAC's remediation plan and efforts, the Attorney General admits its office raised no objection whatsoever and expressly and unconditionally endorsed and encouraged GMAC to continue its remediation efforts. (Attorney General RFA Responses, Ex. 11 at Nos. 10-12; Supp. 053-54; GMAC Answers to First Set of Interrogatories, Ex. 17 at Nos. 8 and 14; Supp. 162-63, 166-67.) Notwithstanding the Attorney General's 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, alleging that GMAC should be strictly liable for giving false odometer disclosures when transferring the vehicles whose odometers had been altered by Midway.

The Federal Bureau of Investigations ("FBI"), which is actively investigating the odometer tampering and fraud perpetrated by Midway, considers GMAC to be a victim of Midway's fraud. (Bhama Tr., Ex. 5 at 25-26; Supp. 017-18; Galvin Affid., Ex. 4 at ¶¶ 10-11; Supp. 003-04; January 7, 2005 Letter from FBI to GMAC; Ex. A to Galvin Affid.; Supp. 005.) Thus, one law enforcement body, namely the Attorney General, is prosecuting GMAC despite its

status as a fraud victim, while another law enforcement body, namely the FBI, champions the rights of GMAC as a fraud victim.

**D. GMAC Paid In Excess Of \$1.2 Million To The Current Owners Of The Affected Vehicles As Full And Complete Remediation.**

Notwithstanding the fact that it had no knowledge of and did not participate in Midway's odometer tampering, GMAC fully remediated the current owners of the Affected Vehicles.

(Bhama Tr., Ex. 5 at 24, 34; Supp. 016, 024; Galvin Affid., Ex. 4 at ¶ 10; Supp. 003-04.)

Midway, the perpetrator of the odometer tampering and fraud, did nothing to remedy or make whole the current owners of the Affected Vehicles. (Galvin Affid., Ex. 4 at ¶ 10; Supp. 003-04.)

Similarly, the Attorney General, the "primary protector of consumer interests in Ohio," (Attorney General RFA Responses, Ex. 11 at No. 11; Supp. 053) did nothing to remediate the current owners of the Affected Vehicles nor to champion their rights in any way, including by vigorously pursuing Midway or any others involved in the odometer tampering and fraud perpetrated by Midway.

Because of GMAC, no consumer has been harmed by Midway's fraud. Specifically, GMAC negotiated with each individual Affected Vehicle owner and either bought the vehicle back or paid a monetary adjustment for the mileage discrepancy, depending upon the preference of the owner. GMAC paid full and complete remediation of over \$1.2 million to those current owners, with the full knowledge and support of the Attorney General. (GMAC Answers to First Set of Interrogatories, Ex. 17 at No. 7; Supp. 161-62; Bhama Tr., Ex. 5 at 32-35; Supp. 022-25.)

The Attorney General admits that GMAC fully remediated current owners of the Affected Vehicles, and that those owners released GMAC from any claims in connection with the odometer readings on their vehicles. (Attorney General Amended RFA Responses, Ex. 14 at No. 14; Supp. 141; Laverty Tr., Ex. 12 at 138-41; Supp. 094-97.) Despite applauding GMAC's

exemplary conduct to make customers whole in the face of Midway's fraudulent scheme, the trial court nonetheless granted the Attorney General's affirmative motion for partial summary judgment, a ruling that was ultimately affirmed by the Tenth District, indicating their hands were tied by prior distinguishable appeals court rulings.

Based on the aforementioned facts and the legal arguments to follow, this Court has ample and compelling legal ground to reverse the Tenth District, and remand to the trial court for the entry of judgment for GMAC.

### LAW AND ARGUMENT

**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.**

Before any statute can be found to impose strict liability a high burden must be met. This Court expressly has mandated that courts are not to impose strict liability under a statute, unless the Legislature explicitly and unambiguously so provides:

It is not enough that the General Assembly in fact intended imposition of liability without proof of mental culpability. Rather the General Assembly must plainly indicate that intention in the language of the statute. There are no words in R.C. 2919.21(B) that do so.

Were we to accept the state's argument that public policy considerations weigh in favor of strict liability, thereby justifying us in construing R.C. 2919.21(B) as imposing criminal liability without a demonstration of any *mens rea*, we would be writing language into the provision which simply is not there – language which the General Assembly could easily have included, but did not.

State v. Collins (2000), 89 Ohio St.3d 524, 529 (emphasis added). Indeed, this Court has since 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 Tenth District opinion failed to abide by the above case law in determining whether or not to affirm the trial court's imposition of strict liability. For the reasons discussed below, and in view of the rigorous standard for imposition of strict liability under Ohio law, this Court should reverse the lower courts' decisions in this case.

**A. The State's Own Odometer Disclosure Affidavit Form Expressly Incorporates A Knowledge Element On Its Face, Meaning That This 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). As will be seen, O.R.C. § 4505.06, and the State of Ohio's actions thereunder, create an express knowledge element with respect to odometer disclosures.

What then are the "true and complete" disclosures required by O.R.C. § 4505.06? The answer resides in O.R.C. § 4505.06(C)(1), which provides 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. . . .

O.R.C. § 4505.06(C)(1). See also Attorney General RFA Responses, Ex. 11 at No. 43; Supp. 062 (Attorney General admits that O.R.C. § 4549.46 requires a transferor to provide an odometer certification in the form prescribed by the Registrar under O.R.C. § 4505.06).

Pursuant to O.R.C. § 4505.06(C)(1), the Registrar of the State of Ohio has issued a mandatory form for use by all vehicle transferors. (Blank Ohio Title with Odometer Disclosure Affidavit, Ex. 23; Supp. 153; Exhibit I to Franklin County Clerk of Courts Title Manual, Ex. 24; Supp. 225.) That mandatory affidavit disclosure form 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 . . .

Reading these statutes and the disclosure affidavit together (as required by statutory construction rules), this means that if a transferor completes the form to the best of its knowledge, it necessarily has given a true and complete disclosure, as required by O.R.C. § 4505.06 and O.R.C. § 4549.46. Simply stated, it is undisputed that the odometer disclosure affidavit forms prescribed by the Registrar of the Bureau Of Motor Vehicles pursuant to O.R.C. § 4505.06(C)(1) contain a knowledge component. The Assistant Chief for the Title Division of the Bureau Of Motor Vehicles, Debbie Couch, testified at her deposition that the odometer disclosure affidavit is premised upon the transferor's knowledge:

Q: You said they had to provide it on knowledge?

A: The final odometer reading is to be stated from the seller to the buyer at the time of transfer.

Q: Upon their knowledge?

A: Upon their knowledge, yes, sir.

(Couch Tr., Ex. 25 at 15; Supp. 243.) Neither the Attorney General nor any other authority has ever advised the Registrar that its odometer disclosure form is improper or illegal. (Id. at 16-17 and 32; Supp. 244-45, 248.) Rather, according to the Registrar -- the public authority exclusively charged with prescribing the forms to comply with Ohio law -- all a transferor must do to satisfy its disclosure requirements under O.R.C. § 4505.06(C)(1) is to note the physical

odometer reading and certify the reliability of the odometer reading to the best of its knowledge.

As Ms. Couch clearly testified:

Q: So to meet its obligations under 4505.06, the Registrar found it to be sufficient to have a transferor certified to the best of my (our) knowledge that the odometer now reads, and then they provide it?

A: That's correct.

(Id. at 23; Supp. 246.) By providing a truthful, knowledge-based odometer disclosure pursuant to O.R.C. § 4505.06(C)(1), the transferor has, as a matter of law, complied with O.R.C. § 4549.46(A). The Attorney General and the lower courts have not articulated a single legal argument to refute this analysis and conclusion, nor can they without literally ignoring and obliterating the words of the statutes and disclosure form.

The Tenth District ignored this clear language. Instead, like the trial court, it ruled that “[g]iven 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.” (Appx. A-13.) In failing to actually analyze the merits of the statutory argument made by GMAC, the Tenth District ignored (1) the plain language of O.R.C. § 4549.46(A), incorporating by specific reference O.R.C. § 4505.06 and, in turn, the odometer disclosure affidavit prescribed by the Registrar in O.R.C. § 4505.06(C)(1); (2) the rule that the knowledge component need not be explicitly stated

in a statute when it is incorporated by reference to another statute<sup>3</sup>; and (3) the cardinal rule of statutory construction that “[a]ll statutes which relate to the same general subject matter must be read in pari materia,” and in doing so, the “court must give such a reasonable construction as to give the proper force and effect to each and all such statutes.” United Tel. Co. v. Limbach (1994), 71 Ohio St.3d 369, 372. The Tenth District effectively re-wrote O.R.C. § 4549.46(A) to reflect a meaning that the plain language simply does not support, that the Ohio Legislature never intended, and that the Registrar has flatly refuted. That was error.

In affirming the trial court, the Tenth District also effectively rewrote the plain language and meaning of the state prescribed form of affidavits truthfully completed by GMAC, striking the language “to the best of my (our) knowledge” in the process. Like the trial court, the Tenth District provided no legal basis for this. Without striking that language from the state-mandated form affidavits, it is undisputed that the affidavits were “true” and GMAC not liable. So the Tenth District, to affirm an imposition of strict liability, had to base it on a form of disclosure that does not exist. That also was error.

The Legislature properly delegated the task of promulgating and wording the affidavit to the Registrar. See Ohio Jur. 3d, Administrative Law, § 2 (“With the growing complexity of modern life, the multiplication of the subjects of governmental regulation, and the increased difficulty of administering the laws, there is a constantly growing tendency toward the delegation of greater powers by the legislature, and toward the approval of the practice by the courts.”) In

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<sup>3</sup> See, e.g., State v. Bumphus (Huron 1976), 53 Ohio App. 2d 171, 174-75 (“the aggravated robbery statute by reference to the theft statute contemplates a precise stated degree of culpability -- to wit, knowingly...”) It is a well-established rule that “[t]he effect of incorporating an existing statutory provision by reference in another statute is the same as if the referenced statute were fully rewritten and repeated verbatim in the other statute.” Robinson v. Tax Com. of Indian Hill (Hamilton C.P. 1989), 61 Ohio Misc. 2d. 95, 97 (citing Lessee of Stall v. MacAlester (1839), 9 Ohio 19, 22).

addition to the specific authority granted the Registrar in O.R.C. § 4505.06(C)(1) to promulgate the odometer disclosure affidavit, O.R.C. § 4501.02(A) also provides that the “[R]egistrar shall administer the laws of the state relative to the registration of and certificates of title for motor vehicles” and that it may “adopt such forms and rules as are necessary to carry out all laws the registrar is required to administer.” O.R.C. § 4501.02(A)(1)(emphasis added).

When the Legislature gave the Registrar these statutory powers, it empowered the Registrar’s form to speak for the State of Ohio as to the legal requirements for filling out an odometer disclosure affidavit. It is well-established Ohio law “that administrative regulations issued pursuant to statutory authority have the force and effect of law[.]” Lyden Co. v. Tracy (1996), 76 Ohio St. 3d 66, 69. If the Legislature believed the odometer disclosure affidavit form was deficient in any way, it could have enacted legislation more specifically prescribing the content of the form, including eliminating the form’s knowledge element if it conflicted with O.R.C. § 4549.46(A). To the extent that the Legislature did not do so, it is not the place of the judiciary to step into the shoes of the Legislature to effectively nullify the use of the Registrar’s prescribed form. Indeed, “Courts ought always to be quite cautious in construing laws so as to alter the powers and responsibilities of the various branches and individual public offices.” The State ex rel. Maureen O’Connor v. Tim Davis (Summit 2000), 139 Ohio App. 3d 701, 716.

Millions of Ohioans have transferred vehicles in reliance on the Registrar’s form of affidavit. It will surely come as a surprise to innocent citizens to learn that someone else could tamper with their odometers without their knowledge, and they could be strictly liable for criminal and civil charges for truthfully filling out the State-prescribed odometer disclosure affidavit. The State of Ohio’s own prescribed form, issued through the Registrar’s statutory

mandate, forecloses a finding that O.R.C. § 4549.46(A) is a strict liability statute. The Tenth District ruling to the contrary was erroneous and should be reversed.

**B. The Legislative Histories Of O.R.C. §§ 4549.46 and 4505.06 Clearly Establish The Absence Of Any Intent To Impose Strict Liability For Odometer Disclosures.**

To adequately address the novel question of whether the knowledge element of O.R.C. § 4505.06(C)(1) means that O.R.C. § 4549.46(A) is not and cannot be a strict liability statute, the trial court should have considered legislative history. Indeed, “[i]t is the duty of the court to construe such statutes so that they are consistent and harmonious with a common policy and give effect to legislative intent.” Ohio Bus Sales, Inc. v. Toledo Bd. of Educ. (Lucas 1992), 82 Ohio App.3d 1, 7; see also United Tel. Co. v. Limbach (1994), 71 Ohio St.3d, 369 372 (“This court in the interpretation of related and co-existing statutes must harmonize and give full application to all such statutes unless they are irreconcilable and in hopeless conflict.”).

Specifically, 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:

In addition, the bill would prohibit a person from failing to provide the odometer mileage disclosure required at the time of transfer of title to the motor vehicle (see above) (sec. 4549.46, lines 249-251).

S.B. 78 (as introduced), 112th Gen. Assem., p. 4 (Ohio 1977) (emphasis added). The legislative history of O.R.C. § 4505.06 itself shows a knowledge requirement:

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). The bill immediately then 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 complete absence of any legislative intent to impose strict liability for odometer disclosure violations. To the contrary, the legislative history unequivocally establishes the intent to proscribe knowingly false odometer disclosures.

Here, it is undisputed, and indeed indisputable, that the Ohio Legislature indicated no intent whatsoever to impose strict liability under O.R.C. § 4549.46. According to the Ohio Supreme Court in Collins, supra, the mere admonition in O.R.C. § 4549.46(A) that “no transferor shall” engage in the specified conduct is insufficient to impose strict liability. This is particularly true where, like here, the legislative history evinces an intent to impose liability for only knowing violations of the statute.

Instead of taking guidance from this legislative history, the Tenth District speculated about what the intent of the Legislature was. For example, it stated 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.” (Appx. A-13.) This mere speculation -- in the face of the unambiguous statutory language and clear legislative intent -- is contrary to the mandate of Collins, supra, and does not satisfy the rigorous standard for a statute to be considered a strict liability one. The Tenth District erred in not considering this probative legislative history showing that O.R.C. § 4549.46 is not a strict liability statute.

**C. The Tenth District Improperly Relied Upon Dicta From Case Law That Never Addressed The Knowledge Element Imposed By O.R.C. § 4505.06(C)(1).**

In affirming the trial court's strict liability ruling, the Tenth District devoted most of its discussion to addressing dicta from prior, inapposite case law interpreting the odometer disclosure statute. The issue of each defendant's knowledge was not before those other courts, because in each case the defendant was admittedly and unquestionably responsible for the odometer inaccuracies, and therefore, gave odometer disclosures that were not to the best of their knowledge, because they were false. As such, those courts had no reason or legal basis to address whether strict liability applied. Therefore, any conclusion about the strict liability nature of O.R.C. § 4546.49(A) is non-binding dicta. In Flint v. Ohio Bell Tel. Co. (Summit 1982), 2 Ohio App.3d 136, a case discussed by the Tenth District, the court narrowly held a telephone company -- which was indisputably responsible for the odometer discrepancy -- strictly liable for a disclosure violation. (Appx. A-10.) The defendant knew the odometer reading was false when it gave the odometer disclosure, and therefore it was unnecessary for the Flint court to even address the level of mental culpability required for a violation. As such, the Flint court's statement that knowledge is not an element of an odometer disclosure violation and its entire discussion of strict liability are pure dicta. The Flint court never purported to address the argument advanced by GMAC in this action, namely, that 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. Nor did the Flint court determine whether liability could extend to someone, like GMAC, who did not have possession or control of the vehicle, did not have knowledge of, or participate in the fraud, and did not have knowledge of or participation in

the odometer discrepancy, but was, in fact, a victim of the fraud. Consequently, Flint has no bearing on this action.

The Tenth District's reliance on Baek v. City of Cincinnati (Hamilton 1988), 43 Ohio App.3d 158, was equally flawed. (Appx. A-10 to A-11.) The defendant in that case, unlike GMAC, was the sole owner and party in possession of the vehicle during the period before its transfer, and expressly admitted to creating, and having knowledge of, the odometer discrepancy, and consequently giving a false odometer disclosure statement. Thus, the knowledge element of O.R.C. § 4549.46(A) was not before the Court in Baek and was completely irrelevant to its decision. Therefore, all analysis and discussions regarding strict liability are pure dicta and not controlling.

The Tenth District also relied heavily upon an earlier case from that district styled Hubbard v. Bob McDorman Chevrolet, Inc. (Franklin 1995), 104 Ohio App.3d 621. However, that case also never discussed the knowledge element of O.R.C. § 4549.46(A). Furthermore, it never discussed whether a third-party financial institution who played no part in the odometer tampering, had no knowledge of it, and was an assignee for lease-financing purposes, can be held liable under the statute for making a truthful disclosure to the best of its knowledge. As the Tenth District noted, strict liability was found in Hubbard where the "discrepancy occurred while the vehicle was in the possession of the [seller]." (Appx. A-11.) That fact renders Hubbard even more distinguishable, because GMAC was not in possession of the vehicles when the odometers were tampered with by Midway.

Other decisions relied upon by the Tenth District, including Falasco v. Bishop Motors, Inc. (Summit 1990), 1990 Ohio App. LEXIS 4938; Triplett v. Voros (Summit 1996), 114 Ohio App.3d 268; Hughes v. Miller (1991), 72 Ohio App. 3d 633; Moon v. Miller (Sandusky 1991),

77 Ohio App. 3d 157; Ragland v. Dumm (Oct. 15, 1993), Ross App. NO. 92CA1915, 1993 Ohio App. Lexis 5016; Harrell v. Talley (July 23, 2007), Athens App. No. 06CA41, 2007 Ohio 3784; and Noble v. Atomic Auto Sales, Inc. (Jan. 24, 2008), Cuyahoga App. No. 89431, 2008 Ohio 233; are subject to the same limitations. In fact, each of those cases relied on Flint and/or Baek for the proposition that O.R.C. § 4549.46(A) is a strict liability statute. However, these cases failed to consider the statutory argument made by GMAC here because their facts precluded any need to address the knowledge element. For example, cases like Ragland, Moon and Hughes focused on the availability of “a previous owner” defense rather than whether O.R.C. § 4549.46(A) is a strict liability statute, while Triplett and Noble involved the transferor having possession of the vehicles and knowledge of the odometer inaccuracies.

In determining whether to adopt Proposition of Law No. 1, this Court should not be swayed by dicta from prior cases, which are inapposite and non-controlling. Instead, it should enforce the proper construction of O.R.C. §§ 4546.49 and 4505.06, and the Registrar’s odometer disclosure affidavit, all of which comprise the statutory framework that GMAC and countless other vehicle transferors have relied upon.

**D. At A Minimum, Violation Of O.R.C. § 4505.06 Is A “Predicate” To Liability Under O.R.C. § 4549.46(A), And Strict Liability Cannot Be Imposed Where, As Here, The Predicate Statute Contains A Knowledge Element.**

It is well-established under Ohio law that where a violation of one statute is predicated upon the violation of another, a party cannot be held liable unless it violated the predicate statute. See Northeast Ohio College of Massotherapy v. Burek (Mahoning 2001), 144 Ohio App.3d 196, 211 (conspiracy claim failed where alleged predicate claim failed). Moreover, the law is clear that if a party did not possess the state of mind necessary to commit the predicate offense, it cannot be held liable for a “strict liability” derivative offense:

We find that the legislature has plainly indicated a purpose to impose strict liability on persons who are within one thousand feet of a school when they knowingly traffic in drugs.... [However,] the specification [does not] threaten to criminalize behavior that is otherwise innocent. A knowing violation of the underlying offense of drug trafficking is necessary to satisfy the elements of the specification.

State v. Miller (Montgomery July 30, 1993), No. 13121, 1993 Ohio App. LEXIS 3806, \*6, (emphasis added).

GMAC did, in fact, provide the disclosures required under O.R.C. § 4505.06(C)(1). Those disclosures were truthful and complete. The Attorney General, and the lower courts wholeheartedly agreed. There is absolutely no showing in the Record below to even suggest that GMAC knew, or even had a hint, the odometer disclosures provided were not truthful and complete. As a result, there can be no violation of O.R.C. § 4505.06(C)(1) as a predicate statute, and thus, no violation of the derivative statute, O.R.C. § 4549.46(A). (Couch Tr., Ex. 25 at 23-24, 35; Supp. 246-47, 250.)

By its express terms, any violation of O.R.C. § 4549.46(A) is predicated upon a violation of O.R.C. § 4505.06. The statute reads: “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). Absent a violation of the predicate statutory section (i.e., O.R.C. § 4505.06), by the provision of untruthful disclosures, there can be no violation of the derivative section (i.e., O.R.C. § 4549.46(A)). Here, the disclosures required by the predicate statute were true, and therefore there is no violation of O.R.C. § 4549.46(A).

In upholding the trial court’s strict liability ruling, the Tenth District did not even consider GMAC’s predicate offense argument. In doing so, the Tenth District merely perpetuated the faulty reasoning of the trial court in this regard. The trial court, in dismissing GMAC’s argument that the predicate offense had not been committed, stated, “there is ample

evidence that the predicate offense, i.e. the failure to provide true and accurate disclosures, has been committed.” (Appx. A-32.) But, this statement is completely unsupported by the Record evidence, which includes the Attorney General’s voluntary admissions, as well as the trial court’s own findings. The disclosures that were signed by GMAC were undeniably and indisputably true to the best of GMAC’s knowledge (which is the legally prescribed standard), and that was the only form of disclosure given and mandated by the State of Ohio. That means no predicate offense occurred under O.R.C. § 4505.06.

**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.**

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 Ohio law, the Registrar prescribed an odometer disclosure affidavit containing an express, unambiguous knowledge element. In doing so, the Registrar exercising its statutory authority and mandate, affirmatively notified all transferors of vehicles in Ohio that they would not be liable under the odometer laws if they gave disclosures that were to the best of their knowledge. (Couch Tr., Ex. 25 at 23-24, 35; Supp. 246-47, 250.) Millions of cars have been transferred in Ohio with that understanding both before and after this case was originally filed.

In this case, however, the conduct of the State frustrated reliance on the statutorily-prescribed form, and thereby resulted in an entrapment of GMAC. 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 current Tenth District ruling, a party may truthfully sign an odometer disclosure statement to the best of his or her knowledge, only to have the State seek quasi-criminal civil penalties on the basis of an alleged strict liability statute that is at odds with the plain language of the State’s own mandated odometer disclosure affidavit form issued pursuant to another, related state statute. In such a case, the State, through its odometer disclosure affidavit form, is inducing citizens to make a disclosure “to the best of [their] knowledge” so that it may later prosecute the party for violation of the hidden strict liability statute. Such mandated 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).<sup>4</sup>

Here, the State of Ohio required GMAC to exercise the “privilege” of providing knowledge-based odometer disclosures. The State then sought to penalize GMAC for exercising this mandatory “privilege,” thereby entrapping GMAC in the “most indefensible” way.

Moreover, what the State effectively has done here is to strike the words “to the best of my (our) knowledge,” post facto, from GMAC’s affidavits. Only by striking those words do the affidavits become untrue. With the words “to the best of my (our) knowledge,” the affidavits are true, and there is no false “disclosure” under O.R.C. §§ 4505.06(C)(1) and 4549.46. The fact GMAC’s affidavits, evidence in this case, are being effectively altered to fit the Attorney General’s strict liability misreading of O.R.C. §§ 4505.06(C)(1) and 4549.46, proves everything in this case.

Furthermore, the State, acting through the Attorney General as its agent, also led GMAC to believe that it would not be subject to liability under the odometer disclosure laws by repeatedly and consistently encouraging GMAC to continue with its self-initiated, proactive efforts to remediate any damages faced by the current owners of the Affected Vehicles. (GMAC Answers to First Set of Interrogatories, Ex. 17 at Nos. 8 and 14; Supp. 162-63, 166-67; Bhamra Tr., Ex. 5 at 32-35; Supp. 022-25; Galvin Affid., Ex. 4 at ¶ 9; Supp. 003.) In an effort to extract

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<sup>4</sup> 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, supra, and Laub, infra, to strike down government’s efforts to prosecute defendant for Medicare fraud where federal departments and agencies had previously approved defendant’s billing methods).

Despite the fact 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”).

money in the form of civil penalties from GMAC, the Attorney General sought to punish GMAC for the conduct previously endorsed. Such tactics offend and violate the most basic notions of due process:

Ordinarily, citizens may not be punished for actions undertaken in good faith reliance upon authoritative assurance that punishment will not attach. As this Court said in Raley v. Ohio, we may not convict “a citizen for exercising a privilege which the State clearly had told him was available to him.” As Raley emphasized, criminal sanctions are not supportable under “vague and undefined” commands [citation omitted]; or if they are “inexplicably contradictory”; and certainly not if the Government’s conduct constitutes “active misleading”

U.S. v. Laub (1967), 385 U.S. 475, 487 (emphasis added).

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. (Couch Tr., Ex. 25 at 16-17; Supp. 244-45.) The presumably unintended consequences of holding that O.R.C. §§ 4505.06(C)(1) and 4549.46(A) create 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 consumers and calling into question the validity of millions of odometer disclosure affidavits.

The Tenth District rejected GMAC’s entrapment claim, but only did so in reliance on its misplaced interpretation of O.R.C. § 4549.46(A) as being a strict liability statute which is based on dicta in non-controlling Ohio appellate cases. (Appx. A-14.) Indeed, the court found that even though GMAC was required to use the state-mandated disclosure forms, it “was not induced” to set forth untrue odometer readings. (Appx. A-14.) This conclusion ignores the fundamental fact that GMAC did not set forth untrue odometer disclosures, but rather set forth truthful, complete disclosures under the prescribed standard. Moreover, GMAC was required, the ultimate form of inducement, to sign the state-mandated odometer disclosure affidavit forms

as a precondition to transferring the vehicles. To the extent the mandated form itself had a knowledge element, imposing liability where the actual mileage turned out to be inaccurate, but the mileage disclosure was accurate “to the best of [GMAC’s] knowledge,” constitutes entrapment. By accepting GMAC’s first Proposition of Law that O.R.C. § 4549.46(A) is not a strict liability statute, it logically and necessarily follows that imposing strict liability on GMAC amounted to entrapment.

**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.**

By the express and unambiguous language of O.R.C. § 4549.46(A), GMAC cannot be liable for an inaccurate odometer reading when 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.

O.R.C. § 4549.46(A) (emphasis added). Indeed, the Attorney General recognizes that subsequent owners of the altered vehicles cannot be liable under O.R.C. § 4549.46(A) when the conduct of a previous owner caused the rollback. (Lavery Tr., Ex. 12 at 136-37; Supp. 092-93.)

It is undisputed that Midway was “a previous owner” of the Affected Vehicles, as the Tenth District recognized. (Appx. A-6.) It is also undisputed that Midway, as “a previous owner,” rolled back and/or tampered with the odometers of the Affected Vehicles. (Id.) Indeed, GMAC never had physical possession of the Affected Vehicles. (Bhama Tr., Ex. 5 at 17; Supp.

014; Galvin Affid., Ex. 4 at ¶ 6; Supp. 002; GMAC RFA Responses, Ex. 6 at No. 1; Supp. 029-30; Attorney General's RFA Responses, Ex. 11 at No. 22; Supp. 056.) Finally, it is undisputed that at the time the Affected Vehicles were transferred, GMAC did not know, have reason to know, or disregard any facts that would have revealed the wrongful actions of Midway as "a previous owner."

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 unambiguously refers to the conduct of "a previous owner." It contains no temporal element even suggesting that "a previous owner" had to own the vehicle at the time of rollback. Rather, it only requires "a previous owner" to be the perpetrator of the wrongdoing. Midway is "a 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. 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 "a previous owner" had violated the statute).

The Tenth District's ruling creates a new judicial exception to the statutory rule. Now, "a previous owner" defense is not available to a finance company victim of odometer rollbacks where such rollbacks were perpetrated by a previous owner while the victim was the titled, out-

of-possession, owner of the vehicles.<sup>5</sup> The statute contains no such language. Nor does the statute even suggest the result reached by the lower courts. Nor does Ohio's transfer of title affidavit. This Court needs to repair the Tenth District's misinterpretation of the plain language of the statutes and set aside the unjust result proceeding from the lower courts' rulings.

### **CONCLUSION**

For the foregoing reasons, GMAC respectfully asks this Court to reverse the decision of the Tenth District Court of Appeals and remand this cause to the trial court for entry of judgment in favor of GMAC consistent with its Opinion.

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<sup>5</sup> The Tenth District cited to Hughes v. Miller (Putnam 1991), 72 Ohio App. 3d 633, 638, for the proposition that "[t]he 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." (emphasis added) (Appx. A-17.) This statement does not address a previous owner who tampered with the odometers without the "actual knowledge" of the current owner.

Respectfully Submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing Merit Brief of Appellant GMAC LLC was served, this 22<sup>nd</sup> day of December, 2008, upon the following via regular, U.S. mail, postage prepaid:

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Counsel of Record for *Amici Curiae*

  
\_\_\_\_\_  
Michael H. Carpenter

127-527:215688

**IN THE SUPREME COURT OF OHIO**

State of Ohio ex rel. Nancy Rogers, : Case No. 2008-1451  
Attorney General of Ohio, :  
 :  
 :  
 Plaintiff-Appellee, : ON APPEAL FROM THE FRANKLIN  
 : COUNTY COURT OF APPEALS, TENTH  
 v. : APPELLATE DISTRICT  
 :  
 :  
 Midway Motor Sales, Inc., et al., : Court of Appeals  
 : Case No. 07AP-744  
 :  
 Defendant-Appellee, :  
 :  
 :  
 (General Motors Acceptance Corporation, :  
 n/k/a GMAC LLC, :  
 :  
 :  
 Defendant-Appellant). :

---

**APPENDIX**

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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

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NOTICE OF APPEAL OF DEFENDANT-APPELLANT GMAC LLC

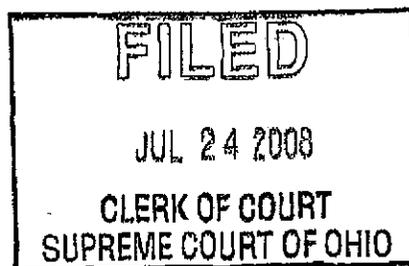
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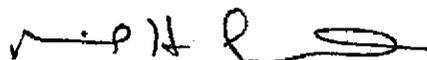


**NOTICE OF APPEAL OF DEFENDANT-APPELLANT GMAC LLC**

Defendant-Appellant GMAC LLC hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Franklin County Court of Appeals, Tenth Appellate District, entered in Court of Appeals Case No. 07AP-744 on June 10, 2008.

This case is one of public and great general interest.

Respectfully Submitted,



---

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Attorneys For Defendant-Appellant  
GMAC LLC

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing Notice Of Appeal Of Defendant-Appellant GMAC LLC was served, this 24<sup>th</sup> day of July, 2008, upon the following via regular, U.S. mail:

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\_\_\_\_\_  
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IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

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COURT OF APPEALS  
FRANKLIN CO. OHIO  
2008 JUN 10 PM 1:14  
CLERK OF COURTS

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

Plaintiff-Appellee, :

No. 07AP-744

(C.P.C. No. 05CVH-00175)

v. :

(REGULAR CALENDAR)

Midway Motor Sales, Inc. et al., :

Defendants-Appellees, :

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

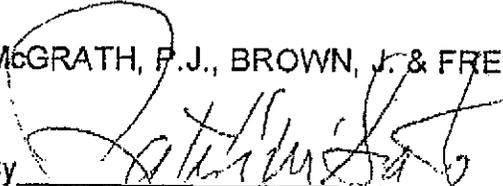
Defendant-Appellant). :

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.

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)

FILED  
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FRANKLIN CO. OHIO  
2008 JUN 10 PM 12:40  
CLERK OF COURTS

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O P I N I O N

Rendered on June 10, 2008

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*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.

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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

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.<sup>1</sup> 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.

GMAC implemented a remediation plan concerning the current owners of these vehicles.<sup>2</sup>

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

<sup>2</sup> 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.<sup>3</sup> 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

<sup>3</sup> 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 FRANKLIN COUNTY COURT OF COMMON PLEAS

State of Ohio, *ex rel.* :  
Jim Petro, Attorney General :  
of Ohio, :  
 :  
Plaintiff, :  
 :  
v. :  
 :  
Midway Motor Sales, Inc., et al., :  
 :  
Defendants. :

Case No. 05 CVH 01-175

Judge Sheeran

FILED  
FRANKLIN COUNTY COURT  
MAY 15 2006  
CLERK OF COURTS

DECISION OVERRULING PLAINTIFF'S  
MOTION TO DISMISS  
(FILED MARCH 15, 2005)

AND

DECISION WITHHOLDING RULING ON  
MOTION FOR DEFAULT JUDGMENT PENDING HEARING  
(FILED MARCH 15, 2005)

AND

DECISION SUSTAINING MOTION OF PLAINTIFF STATE OF OHIO  
FOR PARTIAL SUMMARY JUDGMENT ON HIS COMPLAINT AND  
FOR SUMMARY JUDGMENT ON THE COUNTERCLAIM OF DEFENDANT  
GENERAL MOTORS ACCEPTANCE CORPORATION  
(FILED OCTOBER 12, 2005)

AND

DECISION AND ENTRY OVERRULING  
MOTION OF DEFENDANT FOR ORAL ARGUMENT  
(FILED NOVEMBER 7, 2005)

Rendered this 30<sup>th</sup> day of May, 2006.

Sheeran, J.

Plaintiff's Motion to Dismiss, Motion for Default Judgment, and Motion for Summary Judgment and Defendant's Motion for Oral Argument are addressed individually below.

❖ **MOTION TO DISMISS**

Plaintiff, the State of Ohio, by and through Attorney General Jim Petro ("Plaintiff"), filed a Motion to Dismiss on March 15, 2005 seeking the dismissal of Count I and all monetary demands of Defendant General Motor Acceptance Corporation's ("GMAC") Counterclaim. However, on April 21, 2005, this Court, through a journal entry, allowed GMAC to file an amended answer and counterclaim which contained no demands for monetary relief. This same entry denied as Moot Plaintiff's Motion to Dismiss. However, the Motion was not removed from the Court's pending Motions docket.

Given all of the above and having previously found it Moot, Plaintiff's Motion to Dismiss is OVERRULED.

❖ **MOTION FOR DEFAULT JUDGMENT**

Also on March 15, 2006, Plaintiff filed a Motion for Default Judgment against Defendant Midway Motor Sales, Inc. ("Midway"). The Motion correctly indicates that Midway was served on January 21, 2005 but failed to file an Answer or otherwise plead. However, on May 18, 2005 Midway did make a limited appearance in the case indicating that it was filing for bankruptcy. Ohio Civ. R. 55(A) states, in pertinent part:

When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, the party entitled to a judgment by default shall apply in writing or orally to the court therefore... If the party against whom judgment by default is sought has appeared in the action, he (or if appearing by representative, his representative) shall be served with written notice of the application for

judgment at least seven days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter; the court may conduct such hearings or order such references as it deems necessary and proper... (emphasis added).

Local Rule 55 further provides:

If the party against whom judgment by default is sought has appeared in the action, written notice of the hearing on the motion along with the date and time fixed by the Assignment Commissioner with the concurrence of the Trial Judge shall be served upon that party. In order for the Trial Judge to award damages and enter judgment, to establish the truth of any averment by evidence, or to make an investigation of any other matter, the Trial Judge may conduct hearings or order references as necessary and proper and shall, when applicable, accord a right of trial by jury to the parties. (emphasis added).

Further, the 10<sup>th</sup> District in *Lexis-Nexis v. Robert Binns Associates* (Dec. 1, 1998), 10<sup>th</sup> Dist. No. 98AP-228, stated:

This court has held that: If a party or his representative has appeared as a matter of record in any manner, notice required by Civil Rule 55(A) must be given that party before default judgment can be properly granted." Even where a defendant's filings are subsequent to a plaintiff's motion for default, defendant is deemed to have made an appearance and is entitled to the notice required under Civ.R. 55(A)... Without "the requisite notice under Civ.R. 55(A) and Loc. R. 55...the default judgment entered against appellant must be vacated." (emphasis added).

The 10<sup>th</sup> District, *Binns*, continued, "This court has held that where a defendant has not received the seven day notice of the date and time of the default judgment, the court's entry in such default judgment proceedings is voidable, and subject to being vacated under a Civ.R. 60(B) analysis."

Given all of the above, the Court hereby WITHHOLDS ruling on the Motion for Default Judgment pending a hearing regarding the same to take place before the Court's Magistrate. Should Midway fail to appear, Default Judgment can be entered and the

Magistrate can proceed with a damages hearing at that time. A separate Order of Reference will be issued for this purpose.

❖ **MOTION FOR SUMMARY JUDGMENT**

Plaintiff's Motion for Partial Summary Judgment on his own Complaint and for Summary Judgment on GMAC's counterclaim ("Motion for Summary Judgment") was filed on October 12, 2005. On November 7, 2006, GMAC filed its Memorandum Contra and Plaintiff replied on November 18, 2006. For the following reasons, the Court hereby SUSTAINS Plaintiff's Motion for Summary Judgment.

• **Facts**

There is really no dispute as to the material facts. Defendant Midway Motor Sales, Inc. ("Midway") bought vehicles from General Motors to sell at its dealership in Youngstown, Ohio. Midway then leased numerous vehicles to Modern Builders Supply, Inc. The leases as well as the vehicles were then assigned to GMAC, with the vehicles being titled in its name. After the leases expired, Midway obtained possession of the vehicles and altered and/or rolled back the odometers on 85 - 93 of the vehicles without GMAC's knowledge or consent.<sup>1</sup> Defendant GMAC owned the vehicles at the time of the "rollbacks" though the vehicles were never physically possessed by GMAC. These vehicles were then sold at auctions to automobile dealers.

At the time of their sale, GMAC completed odometer statements. However, they were inaccurate. These statements were completed before GMAC learned of Midway's

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<sup>1</sup> The inventory attached to Plaintiff's Motion lists 93 vehicles while GMAC's Memorandum Contra indicates that the odometers of 85 vehicles were altered. While there appears to be a dispute as to the number of vehicles involved, this will not preclude summary judgment on liability on the claims for violations of R.C. § 4549.46 and will be part of the subject of the damages hearing discussed more fully, *infra*.

alteration and/or rolling back of the odometers. The vehicles were ultimately sold to retail purchasers.

It bears emphasizing that Midway, not GMAC, was responsible for the tampering and that GMAC had no knowledge of Midway's actions. In fact, GMAC uncovered Midway's fraud and reported it to Plaintiff. GMAC formulated a remediation plan which Plaintiff encouraged. These remediation efforts included the payment of \$1.2 million to the current owners of the affected vehicles. GMAC negotiated with each owner and either bought back the vehicles or paid a monetary adjustment for which GMAC received releases from the owners.

- **Discussion**

Plaintiff seeks Summary Judgment as to Count Two of his Complaint and on GMAC's counterclaim in its entirety.

**-Count Two of Plaintiff's Complaint- Odometer Disclosures**

Count Two of Plaintiff's Complaint alleges violations of R.C. § 4549.46, the Odometer Rollback and Disclosure Act, which states:

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.

In *Flint v. Ohio Bell Tel. Co.* (1982), 2 Ohio App.3d 136, 137, 440 N.E.2d 1244, a case relied upon by Plaintiff, the 9<sup>th</sup> District, interpreting a former version of R.C. § 4549.46, held that it was a strict liability statute. The Court reasoned that the absence of a requisite degree of mental culpability in R.C. § 4549.46 where the legislature specified a mental

state in preceding sections indicated clear legislative intent to impose strict liability. In fact, though some changes to the statute have taken place since *Flint*, R.C. § 4549.46 still fails to specify any mental state while the preceding sections, R.C. § 4549.42 through § 4549.46, specify a particular level of mental culpability. The *Flint* Court reasoned:

In Ohio, intent is not required where the accused had the means of knowledge relating to the facts of the violation, or, where, because of substantial and significant public interest involved, the accused had a duty to ascertain the facts of the violation. *State v. Williams* (1952), 94 Ohio App. 249 [51 O.O. 414]. See, also, *25 Ohio Jurisprudence 3d 160-161, Criminal Law, Section 54*. In the instant case, Ohio Bell had the means of knowing the true odometer reading. In fact, appellant was the only person with access to such knowledge. Further, the public has a substantial interest in insuring accurate disclosure of odometer readings when motor vehicles are transferred. Indeed, motor vehicle laws are one of eight areas of the law listed by the United States Supreme Court as amenable to imposition of strict liability. See *Morissette v. United States* (1952), 342 U.S. 246, 262, fn. 20. Further, because of the difficulties inherent in determining the accused's subjective intent under R.C. 4549.46, requiring the transferee to prove recklessness in a lawsuit pursuant to R.C. 4549.49 would make the statute virtually unenforceable. Thus, we hold that Ohio Bell had a strict duty to ascertain the true mileage of the vehicle. (emphasis added).

Other Ohio Appellate Districts, including the 10<sup>th</sup> District, have reached similar holdings. In *Baek v. City of Cincinnati* (1988), 43 Ohio App.3d 158, 161, 539 N.E.2d 1149, the 1<sup>st</sup> District held, "R.C. 4549.49 holds a transferor strictly liable to any subsequent transferee for a violation of R.C. 4549.46(A), without regard for the transferor's intent or the transferee's knowledge." The *Baek* Court specifically rejected any argument that liability should not be imposed for inadvertent mistakes.

Likewise, in *State ex rel. Celebreeze v. Calautti* (Sept. 1, 1989), 7<sup>th</sup> Dist. No. 88 CA 88, the Court, citing *Flint's* reasoning, found that "the absence of a culpable mental state in R.C. 4549.46, when construed with the surrounding provisions of the Ohio Odometer Rollback and Disclosure Act, indicates that the legislature intended R.C.

4549.46 to be a strict liability offense.” And, in *Falasco v. Bishop Motors* (Nov. 7, 1990), 9<sup>th</sup> Dist. No. CA No. 14637, the Court found that strict liability was appropriate even where the Defendant claimed a mere typographical error.

In *Triplett v. Voros* (1996), 114 Ohio App.3d 268, 683 N.E.2d 63, a Defendant claimed that the buyer of an automobile knew that the odometer reading was incorrect and instructed the seller to not disclose the true mileage on the disclosure form. The Court found that the Defendant should nonetheless be held strictly liable. The Court reasoned,

It is undisputed that Voros failed to disclose the vehicle's true mileage on the odometer disclosure form. By failing to provide the requisite disclosure, she violated R.C. 4549.46(A). Transferors who violate R.C. 4549.46 are held strictly liable for their conduct... There is only one defense to liability which is written into the statute... That defense, relevant only when there has been a violation by a previous owner, is inapplicable here.

It is no defense that the transferee had knowledge that the odometer reading was incorrect... 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... Therefore, the trial court erred in failing to grant summary judgment in Triplett's favor on the issue of liability. (internal cites omitted).

Finally, in *Hubbard v. Bob McDorman Chevrolet* (1995), 104 Ohio App.3d 621, 662 N.E.2d 1102, the 10<sup>th</sup> District held:

proof of the statutory violation alone is sufficient to impose liability and one need not demonstrate any sort of fraudulent intent. Moreover, the fact that appellant may have had actual knowledge of the true odometer reading does not abdicate appellee from its responsibility to provide an accurate odometer statement... Nor does the Ohio statute require actual tampering with the odometer. Rather, such liability exists simply as a result of nondisclosure of the true mileage on a previous title, regardless of

whether there is any actual odometer tampering. (internal cites omitted and emphasis added).

*Hubbard* found that strict liability applied despite there being no evidence of knowledge, a prerequisite for liability under the Ohio statute's federal counterpart.

Plaintiff argues that it is undisputed that GMAC transferred the vehicles with incorrect odometer disclosure statements and that he is, therefore, entitled to summary judgment.

Defendant argues that R.C. § 4549.46, because it incorporates the odometer disclosure requirements set forth in R.C. § 4505.06, contains an "express" knowledge requirement. Defendant cites R.C. § 4505.06 which provides, "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." This prescribed form 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."

GMAC relies on testimony from Debbie Couch, the Assistant Chief for the Title Division of the Bureau of Motor Vehicles, wherein she stated that the odometer statement is based on the seller's knowledge, that the Registrar has not been advised by Plaintiff that its form is improper, and that this form is the only one required. GMAC argues that Plaintiff is asking the Court to re-write R.C. § 4549.46 to reflect a meaning not supported by the statute's language.

GMAC claims that well-known rules of statutory construction that statutes which relate to the same general subject matter should be read *in pari material* and that statutes which refer to each other must be read together dictate the conclusion that 4549.46 contains a knowledge requirement and that legislative history indicates a knowledge

requirement. Finally, GMAC argues that the cases discussed *supra* are inapplicable to the present case.

None of GMAC's arguments are persuasive. First, to the extent GMAC argues that R.C. § 4549.46 contains an "express" knowledge requirement, this is simply not the case. The statute mentions no level of mental culpability. Further, though R.C. § 4549.46 imposes a penalty for failure to provide the true and complete odometer disclosures required by R.C. § 4505.06, that section does not contain any knowledge requirement. Rather, it makes the registrar responsible for prescribing the form.

It is the form that contains the "to the best of my (our) knowledge" phrase. In other words, though the registrar has included this phrase in the form, no statute requires that the form contain this language. Reading the statute together and/or *in pari material* does not change this result. The fact that an employee of the registrar's office believes the completion of this form satisfies Ohio's statutory requirements and that the registrar has never been advised that the form is improper is of no consequence.

GMAC's arguments also contradict the abundant case law holding that R.C. § 4549.46 is a strict liability statute. GMAC's citation to legislative history does not dictate a different result in the light of very clear case law holding to the contrary. This case law interprets the plain language of the statute which does not contain any reference to knowledge and which imposes liability for the failure to provide true and complete odometer disclosures regardless of the transferor's knowledge. Though the form used in connection with the disclosure contains the "to the best of my knowledge" phrase, this is not required by R.C. § 4505.06, 4549.46 or any other statute.

The cases cited above make clear that the violation occurs by the act of failing to provide true and accurate disclosures, regardless of the knowledge of either the transferor or transferee, regardless of the character of the inaccuracy, regardless of any other wrongdoing, and regardless of who perpetrated the wrongdoing. The inaccurate disclosure itself constitutes the violation for which liability is strictly imposed.

While GMAC obviously disagrees with the holdings of the cases reviewed above, this Court cannot ignore binding precedent. GMAC argues that the cases did not consider whether knowledge is required. This Court disagrees, the various Ohio Appellate Courts cited above can be presumed to be aware of the meaning of strict liability. Strict liability means just that, i.e. liability imposed because of the violation itself regardless of the alleged violator's mental state.<sup>2</sup> In imposing strict liability, therefore, these Courts have eliminated any mental state requirement.

Further, in finding that intent is not required, the various Courts implicitly found that knowledge is not required as knowledge is a prerequisite to intent. In other words, if a transferor has knowledge of the true mileage and the inaccurate disclosure but nonetheless transfers the vehicle, the transferor is acting with intent. In finding the transferor's intent to be irrelevant to liability, the cases above indicate that the transferor's knowledge is also irrelevant. Finally, in both *Baek* and *Falasco*, the respective Courts quoted the "to the best of my knowledge" language required by R.C. 4505.06(B)(2) without indicating it has any import as to the imposition of strict liability.

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<sup>2</sup> As a well-known example, the Court highlights another motor vehicle law, speeding. Because it is a strict liability offense, the fact that a driver does not know they are in a 55 mph zone when they are traveling sixty-five mph is of no import as to liability and certainly will not convince a Court or the officer issuing the citation otherwise.

Further, given the clear language of R.C. § 4549.46 and the cases interpreting it, the Court is not persuaded that Plaintiff, in enforcing the statute, is violating GMAC's due process rights. GMAC argues that it is improper for Plaintiff to punish it for conduct that the state has previously approved. However, neither the statute itself nor the cases cited above expressly approved the conduct sought to be prohibited here. In fact, just the opposite is true. Further, whether the odometer disclosure form is proper is a separate issue from the liability imposed by R.C. § 4549.46 and case law.

GMAC cites case law from other jurisdictions in arguing that imposing liability here would violate principles of fundamental fairness as it is not the perpetrator. The cited Ohio cases imposing strict liability have also foreclosed this argument. Liability being found where there was a claimed typographical error (*Falasco*), where there are only *de minimis* violations and no evidence of tampering (*Hubbard*), where the transferee allegedly had knowledge of and may have even encouraged the discrepancy (*Triplett*), and where there is no intent to violate the statute but rather an inadvertent mistake (*Baek*) may all seem unfair from the violator's perspective, but liability has nonetheless been found. As Ohio Courts have impliedly recognized, the great public interest which underlies the statute outweighs any arguments that the imposition of strict liability is unfair.

Further, despite GMAC's argument to the contrary, there is ample evidence that the predicate offense, i.e. the failure to provide true and accurate disclosures, has been committed. In arguing that it has not, GMAC basically restates its knowledge requirement argument that has already been considered and rejected.

Finally, GMAC argues that Midway, the entity responsible for the tampering who owned the vehicles previous to GMAC, constitutes a "previous owner" under the second sentence of the statute, even though the odometer tampering and inaccurate disclosures occurred while GMAC actually owned the vehicles. The Court finds that GMAC's interpretation incorrectly expands the defense contained in the second sentence of R.C. § 4549.46.

The defense is meant to protect transferors from violations that occurred previous to their ownership. Plaintiff highlights the case of *Hughes v. Miller* (1991), 72 Ohio App.3d 633, 638, 595 N.E.2d 960, wherein the Court found, "[t]he 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." In other words, actual ownership is the key factor. Strict liability is imposed on the actual owner who transfers the vehicle with an inaccurate disclosure regardless of knowledge and regardless of who perpetrated the wrongdoing and liability can only be avoided if the tampering occurred previous to the ownership unless the transferor had knowledge of the tampering or recklessly disregarded facts indicating tampering.

GMAC also claims that no undisputed evidence has been produced as to when the rollbacks occurred. However, GMAC's own answer indicates that the rollback/tampering occurred at lease end while GMAC owned the vehicles.

Given all of the above, Plaintiff is entitled to Summary Judgment as to Count Two of his Complaint asserting a claim under R.C. § 4549.46.

**-Abuse of Process Counterclaim**

As GMAC points out, abuse of process requires the following 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.

*Yaklevich v. Kemp, Schaeffer & Rowe Co., L.P.A.* (1994), 68 Ohio St.3d 294, 298.

Having found that GMAC is strictly liable for the undisputed violations of R.C. § 4549.46, and considering that Plaintiff is charged with the authority to bring actions under the statute by virtue of R.C. § 4549.48, there is simply no evidence that Plaintiff has perverted the proceeding to accomplish an ulterior purpose for which it was not designed. Therefore, the Court finds that Plaintiff is entitled to Summary Judgment on Defendant's Counterclaim for abuse of process.

#### **-Declaratory Judgment**

Given the numerous holdings of Ohio Appellate Court indicating that R.C. § 4549.46 imposes strict liability and finding the imposition valid, there is no basis for a declaratory judgment that the statute contains a knowledge requirement and, therefore, Plaintiff is entitled to Summary Judgment on this counterclaim as well.

#### **• Conclusion**

Plaintiff's Motion for Summary Judgment is SUSTAINED. Further, the Court's ruling on Summary Judgment makes GMAC's Motion for Oral Argument Moot and, therefore, it is OVERRULED. Plaintiff is entitled to judgment on Count Two of his Complaint and the entirety of GMAC's counterclaim.

Further, the Court finds that GMAC is entitled to full consideration of the efforts it undertook to both bring the violations to light and to remediate the affected owners. As such, the Court withholds any decision on damages pending a hearing regarding the same.

Counsel shall prepare the appropriate entry in accordance with Local Rule 25.

It is so ORDERED.

  
JUDGE PATRICK E. SHEERAN

Copies to:

Angie Paul, Esq.  
David Dembinski, Esq.  
Andrew W. Suhar, Esq.  
Midway Motor Sales, Inc.

IN THE COURT OF COMMON PLEAS  
FRANKLIN COUNTY, OHIO  
GENERAL DIVISION

FILED IN CASE NO. 18  
BY: RW 8-15-07

State of Ohio, ex rel. Marc Dann, :  
Attorney General, :  
Plaintiff, : Case No. 05-CV-175  
vs. : Judge Pat Sheeran  
Midway Motor Sales, Inc., et al., :  
Defendants. :

FILED  
COMMON PLEAS COURT  
FRANKLIN CO. OHIO  
2007 AUG 15 PM 2:26  
CLERK OF COURTS

FINAL APPEALABLE

DECISION AND ENTRY ON DAMAGES

Sheeran, J.

This case is before the Court on the issue of statutory damages. An oral hearing on damages was held on May 25, 2007. Counsel for Plaintiff and Defendant GMAC were present, and argued their respective positions.

Prior to that hearing, this Court held that Plaintiff was entitled to summary judgment against Defendant GMAC for odometer rollback violations. The Decision of this Court made it clear that although GMAC was statutorily liable, said Defendant had also discovered the rollbacks, had brought the violations to light, and had made reparations totaling \$1.2 million to the 85 consumers who were presumptively damaged by the non-disclosures, even though the vehicles in question were at the time in question under the physical control of Defendant Midway Motors.

At issue is the statutory penalty Defendant GMAC should face based on R.C. 4549.48 (A). That statute reads in pertinent part as follows:

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 dollars nor more than two thousand dollars *for each violation*.

(Emphasis added).

The facts of this case do not present a situation where Defendant GMAC got caught with its corporate hand in the proverbial cookie jar. Defendant GMAC, as noted above, brought the violations to light, made good faith efforts to address each consumer injured by the fraud of Defendant Midway Motors, and, in the end, spent well over one million dollars to make whole the aforementioned consumers. While GMAC is held strictly liable under existing case law, the corporate *mea culpa* cannot be ignored.

In *State, ex rel. Celebrezze, v. Christopher* (7<sup>th</sup> App. Dist. 1992), the Mahoning County Court of Appeals held that a trial court had the authority to suspend the civil penalties mandated by R.C. 4549.48. This holding is buttressed by *Celebrezze v. Hughes* (1985), 18 Ohio St. 3d 71, where the Ohio Supreme Court recognized the right of a trial court to fashion appropriate orders in odometer rollback cases.

GMAC discovered the odometer rollback situation that by all accounts was perpetrated by Defendant Midway Motor Sales, Inc., and took positive, aggressive action, paying out far more than the *maximum* amount of fines this Court could impose under R.C. 4549.48. This kind of aggressive, remedial action should be encouraged, not penalized.

This Court notes the argument of the Attorney General that Defendant GMAC “could have checked the warranty records [which include odometer readings] on these vehicles prior to their resale.” (Plaintiff’s Memorandum, at p. 5) This Court agrees with this argument, and, in light of the subsequent expense incurred by Defendant GMAC, that certainly appears to be a wise alternative regarding future conduct.

But in terms of the instant case, the discovery of the rollbacks, and the amelioration of damages caused by them at an expense to Defendant GMAC considerably beyond any sanction authorized by law, causes this Court to impose a statutory fine of One Thousand Dollars (\$1,000.00) per violation, and to suspend that fine.

It is so ordered. This is a final appealable order.



---

Patrick E. Sheeran, Judge

Copies to:

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Counsel for Defendant GMAC

## **4501.02 Bureau of motor vehicles - division of emergency medical services.**

(A) There is hereby created in the department of public safety a bureau of motor vehicles, which shall be administered by a registrar of motor vehicles. The registrar shall be appointed by the director of public safety and shall serve at the director's pleasure.

The registrar shall administer the laws of the state relative to the registration of and certificates of title for motor vehicles, and the licensing of motor vehicle dealers, motor vehicle leasing dealers, distributors, and salespersons, and of motor vehicle salvage dealers, salvage motor vehicle auctions, and salvage motor vehicle pools. The registrar also shall, in accordance with section 4503.61 of the Revised Code, take those steps necessary to enter this state into membership in the international registration plan and carry out the registrar's other duties under that section. The registrar, with the approval of the director of public safety, may do all of the following:

- (1) Adopt such forms and rules as are necessary to carry out all laws the registrar is required to administer;
- (2) Appoint such number of assistants, deputies, clerks, stenographers, and other employees as are necessary to carry out such laws;
- (3) Acquire or lease such facilities as are necessary to carry out the duties of the registrar's office;
- (4) Establish accounts in a bank or depository and deposit any funds collected by the registrar in those accounts to the credit of "state of Ohio, bureau of motor vehicles." Within three days after the deposit of funds in such an account, the registrar shall draw on that account in favor of the treasurer of state. The registrar may reserve funds against the draw to the treasurer of state to the extent reasonably necessary to ensure that the deposited items are not dishonored. The registrar may pay any service charge usually collected by the bank or depository.

The registrar shall give a bond for the faithful performance of the registrar's duties in such amount and with such security as the director approves. When in the opinion of the director it is advisable, any deputy or other employee may be required to give bond in such amount and with such security as the director approves. In the discretion of the director, the bonds authorized to be taken on deputies or other employees may be individual, schedule, or blanket bonds.

The director of public safety may investigate the activities of the bureau and have access to its records at any time, and the registrar shall make a report to the director at any time upon request.

All laws relating to the licensing of motor vehicle dealers, motor vehicle leasing dealers, distributors, and salespersons, and of motor vehicle salvage dealers, salvage motor vehicle auctions, and salvage motor vehicle pools, designating and granting power to the registrar shall be liberally construed to the end that the practice or commission of fraud in the business of selling motor vehicles and of disposing of salvage motor vehicles may be prohibited and prevented.

(B) There is hereby created in the department of public safety a division of emergency medical services, which shall be administered by an executive director of emergency medical services appointed under section 4765.03 of the Revised Code.

Effective Date: 09-30-1998; 09-16-2004

## 4505.06 Application for certificate of title.

(A)(1) Application for a certificate of title shall be made in a form prescribed by the registrar of motor vehicles and shall be sworn to before a notary public or other officer empowered to administer oaths. The application shall be filed with the clerk of any court of common pleas. An application for a certificate of title may be filed electronically by any electronic means approved by the registrar in any county with the clerk of the court of common pleas of that county. Any payments required by this chapter shall be considered as accompanying any electronically transmitted application when payment actually is received by the clerk. Payment of any fee or taxes may be made by electronic transfer of funds.

(2) The application for a certificate of title shall be accompanied by the fee prescribed in section 4505.09 of the Revised Code. The fee shall be retained by the clerk who issues the certificate of title and shall be distributed in accordance with that section. If a clerk of a court of common pleas, other than the clerk of the court of common pleas of an applicant's county of residence, issues a certificate of title to the applicant, the clerk shall transmit data related to the transaction to the automated title processing system.

(3) If a certificate of title previously has been issued for a motor vehicle in this state, the application for a certificate of title also shall be accompanied by that certificate of title duly assigned, unless otherwise provided in this chapter. If a certificate of title previously has not been issued for the motor vehicle in this state, the application, unless otherwise provided in this chapter, shall be accompanied by a manufacturer's or importer's certificate or by a certificate of title of another state from which the motor vehicle was brought into this state. If the application refers to a motor vehicle last previously registered in another state, the application also shall be accompanied by the physical inspection certificate required by section 4505.061 of the Revised Code. If the application is made by two persons regarding a motor vehicle in which they wish to establish joint ownership with right of survivorship, they may do so as provided in section 2131.12 of the Revised Code. If the applicant requests a designation of the motor vehicle in beneficiary form so that upon the death of the owner of the motor vehicle, ownership of the motor vehicle will pass to a designated transfer-on-death beneficiary or beneficiaries, the applicant may do so as provided in section 2131.13 of the Revised Code. A person who establishes ownership of a motor vehicle that is transferable on death in accordance with section 2131.13 of the Revised Code may terminate that type of ownership or change the designation of the transfer-on-death beneficiary or beneficiaries by applying for a certificate of title pursuant to this section. The clerk shall retain the evidence of title presented by the applicant and on which the certificate of title is issued, except that, if an application for a certificate of title is filed electronically by an electronic motor vehicle dealer on behalf of the purchaser of a motor vehicle, the clerk shall retain the completed electronic record to which the dealer converted the certificate of title application and other required documents. The registrar, after consultation with the attorney general, shall adopt rules that govern the location at which, and the manner in which, are stored the actual application and all other documents relating to the sale of a motor vehicle when an electronic motor vehicle dealer files the application for a certificate of title electronically on behalf of the purchaser.

The clerk shall use reasonable diligence in ascertaining whether or not the facts in the application for a certificate of title are true by checking the application and documents accompanying it or the electronic record to which a dealer converted the application and accompanying documents with the records of motor vehicles in the clerk's office. If the clerk is satisfied that the applicant is the owner of the motor vehicle and that the application is in the proper form, the clerk, within five business days after the application is filed and except as provided in section 4505.021 of the Revised Code, shall issue a physical certificate of title over the clerk's signature and sealed with the clerk's seal, unless the applicant

specifically requests the clerk not to issue a physical certificate of title and instead to issue an electronic certificate of title. For purposes of the transfer of a certificate of title, if the clerk is satisfied that the secured party has duly discharged a lien notation but has not canceled the lien notation with a clerk, the clerk may cancel the lien notation on the automated title processing system and notify the clerk of the county of origin.

(4) In the case of the sale of a motor vehicle to a general buyer or user by a dealer, by a motor vehicle leasing dealer selling the motor vehicle to the lessee or, in a case in which the leasing dealer subleased the motor vehicle, the sublessee, at the end of the lease agreement or sublease agreement, or by a manufactured home broker, the certificate of title shall be obtained in the name of the buyer by the dealer, leasing dealer, or manufactured home broker, as the case may be, upon application signed by the buyer. The certificate of title shall be issued, or the process of entering the certificate of title application information into the automated title processing system if a physical certificate of title is not to be issued shall be completed, within five business days after the application for title is filed with the clerk. If the buyer of the motor vehicle previously leased the motor vehicle and is buying the motor vehicle at the end of the lease pursuant to that lease, the certificate of title shall be obtained in the name of the buyer by the motor vehicle leasing dealer who previously leased the motor vehicle to the buyer or by the motor vehicle leasing dealer who subleased the motor vehicle to the buyer under a sublease agreement.

In all other cases, except as provided in section 4505.032 and division (D)(2) of section 4505.11 of the Revised Code, such certificates shall be obtained by the buyer.

(5)(a)(i) If the certificate of title is being obtained in the name of the buyer by a motor vehicle dealer or motor vehicle leasing dealer and there is a security interest to be noted on the certificate of title, the dealer or leasing dealer shall submit the application for the certificate of title and payment of the applicable tax to a clerk within seven business days after the later of the delivery of the motor vehicle to the buyer or the date the dealer or leasing dealer obtains the manufacturer's or importer's certificate, or certificate of title issued in the name of the dealer or leasing dealer, for the motor vehicle. Submission of the application for the certificate of title and payment of the applicable tax within the required seven business days may be indicated by postmark or receipt by a clerk within that period.

(ii) Upon receipt of the certificate of title with the security interest noted on its face, the dealer or leasing dealer shall forward the certificate of title to the secured party at the location noted in the financing documents or otherwise specified by the secured party.

(iii) A motor vehicle dealer or motor vehicle leasing dealer is liable to a secured party for a late fee of ten dollars per day for each certificate of title application and payment of the applicable tax that is submitted to a clerk more than seven business days but less than twenty-one days after the later of the delivery of the motor vehicle to the buyer or the date the dealer or leasing dealer obtains the manufacturer's or importer's certificate, or certificate of title issued in the name of the dealer or leasing dealer, for the motor vehicle and, from then on, twenty-five dollars per day until the application and applicable tax are submitted to a clerk.

(b) In all cases of transfer of a motor vehicle, the application for certificate of title shall be filed within thirty days after the assignment or delivery of the motor vehicle. If an application for a certificate of title is not filed within the period specified in division (A)(5)(b) of this section, the clerk shall collect a fee of five dollars for the issuance of the certificate, except that no such fee shall be required from a motor vehicle salvage dealer, as defined in division (A) of section 4738.01 of the Revised Code, who immediately surrenders the certificate of title for cancellation. The fee shall be in addition to all other

fees established by this chapter, and shall be retained by the clerk. The registrar shall provide, on the certificate of title form prescribed by section 4505.07 of the Revised Code, language necessary to give evidence of the date on which the assignment or delivery of the motor vehicle was made.

(6) As used in division (A) of this section, "lease agreement," "lessee," and "sublease agreement" have the same meanings as in section 4505.04 of the Revised Code.

(B)(1) The clerk, except as provided in this section, shall refuse to accept for filing any application for a certificate of title and shall refuse to issue a certificate of title unless the dealer or manufactured home broker or the applicant, in cases in which the certificate shall be obtained by the buyer, submits with the application payment of the tax levied by or pursuant to Chapters 5739. and 5741. of the Revised Code based on the purchaser's county of residence. Upon payment of the tax in accordance with division (E) of this section, the clerk shall issue a receipt prescribed by the registrar and agreed upon by the tax commissioner showing payment of the tax or a receipt issued by the commissioner showing the payment of the tax. When submitting payment of the tax to the clerk, a dealer shall retain any discount to which the dealer is entitled under section 5739.12 of the Revised Code.

(2) For receiving and disbursing such taxes paid to the clerk by a resident of the clerk's county, the clerk may retain a poundage fee of one and one one-hundredth per cent, and the clerk shall pay the poundage fee into the certificate of title administration fund created by section 325.33 of the Revised Code. The clerk shall not retain a poundage fee from payments of taxes by persons who do not reside in the clerk's county.

A clerk, however, may retain from the taxes paid to the clerk an amount equal to the poundage fees associated with certificates of title issued by other clerks of courts of common pleas to applicants who reside in the first clerk's county. The registrar, in consultation with the tax commissioner and the clerks of the courts of common pleas, shall develop a report from the automated title processing system that informs each clerk of the amount of the poundage fees that the clerk is permitted to retain from those taxes because of certificates of title issued by the clerks of other counties to applicants who reside in the first clerk's county.

(3) In the case of casual sales of motor vehicles, as defined in section 4517.01 of the Revised Code, the price for the purpose of determining the tax shall be the purchase price on the assigned certificate of title executed by the seller and filed with the clerk by the buyer on a form to be prescribed by the registrar, which shall be prima-facie evidence of the amount for the determination of the tax.

(4) Each county clerk shall forward to the treasurer of state all sales and use tax collections resulting from sales of motor vehicles, off-highway motorcycles, and all-purpose vehicles during a calendar week on or before the Friday following the close of that week. If, on any Friday, the offices of the clerk of courts or the state are not open for business, the tax shall be forwarded to the treasurer of state on or before the next day on which the offices are open. Every remittance of tax under division (B)(4) of this section shall be accompanied by a remittance report in such form as the tax commissioner prescribes. Upon receipt of a tax remittance and remittance report, the treasurer of state shall date stamp the report and forward it to the tax commissioner. If the tax due for any week is not remitted by a clerk of courts as required under division (B)(4) of this section, the commissioner may require the clerk to forfeit the poundage fees for the sales made during that week. The treasurer of state may require the clerks of courts to transmit tax collections and remittance reports electronically.

(C)(1) If the transferor indicates on the certificate of title that the odometer reflects mileage in excess of the designed mechanical limit of the odometer, the clerk shall enter the phrase "exceeds mechanical limits" following the mileage designation. If the transferor indicates on the certificate of title that the

odometer reading is not the actual mileage, the clerk shall enter the phrase "nonactual: warning - odometer discrepancy" following the mileage designation. The clerk shall use reasonable care in transferring the information supplied by the transferor, but is not liable for any errors or omissions of the clerk or those of the clerk's deputies in the performance of the clerk's duties created by this chapter.

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. The registrar may prescribe an affidavit in which the seller and buyer provide information pertaining to the odometer reading of the motor vehicle in addition to that required by this section, as such information may be required by the United States secretary of transportation by rule prescribed under authority of subchapter IV of the "Motor Vehicle Information and Cost Savings Act," 86 Stat. 961 (1972), 15 U.S.C. 1981.

(2) Division (C)(1) of this section does not require the giving of information concerning the odometer and odometer reading of a motor vehicle when ownership of a motor vehicle is being transferred as a result of a bequest, under the laws of intestate succession, to a survivor pursuant to section 2106.18, 2131.12, or 4505.10 of the Revised Code, to a transfer-on-death beneficiary or beneficiaries pursuant to section 2131.13 of the Revised Code, in connection with the creation of a security interest or for a vehicle with a gross vehicle weight rating of more than sixteen thousand pounds.

(D) When the transfer to the applicant was made in some other state or in interstate commerce, the clerk, except as provided in this section, shall refuse to issue any certificate of title unless the tax imposed by or pursuant to Chapter 5741. of the Revised Code based on the purchaser's county of residence has been paid as evidenced by a receipt issued by the tax commissioner, or unless the applicant submits with the application payment of the tax. Upon payment of the tax in accordance with division (E) of this section, the clerk shall issue a receipt prescribed by the registrar and agreed upon by the tax commissioner, showing payment of the tax.

For receiving and disbursing such taxes paid to the clerk by a resident of the clerk's county, the clerk may retain a poundage fee of one and one one-hundredth per cent. The clerk shall not retain a poundage fee from payments of taxes by persons who do not reside in the clerk's county.

A clerk, however, may retain from the taxes paid to the clerk an amount equal to the poundage fees associated with certificates of title issued by other clerks of courts of common pleas to applicants who reside in the first clerk's county. The registrar, in consultation with the tax commissioner and the clerks of the courts of common pleas, shall develop a report from the automated title processing system that informs each clerk of the amount of the poundage fees that the clerk is permitted to retain from those taxes because of certificates of title issued by the clerks of other counties to applicants who reside in the first clerk's county.

When the vendor is not regularly engaged in the business of selling motor vehicles, the vendor shall not be required to purchase a vendor's license or make reports concerning those sales.

(E) The clerk shall accept any payment of a tax in cash, or by cashier's check, certified check, draft, money order, or teller check issued by any insured financial institution payable to the clerk and submitted with an application for a certificate of title under division (B) or (D) of this section. The clerk also may accept payment of the tax by corporate, business, or personal check, credit card, electronic transfer or wire transfer, debit card, or any other accepted form of payment made payable to the clerk. The clerk may require bonds, guarantees, or letters of credit to ensure the collection of corporate, business, or personal checks. Any service fee charged by a third party to a clerk for the use of any form of payment may be paid by the clerk from the certificate of title administration fund created in section

325.33 of the Revised Code, or may be assessed by the clerk upon the applicant as an additional fee. Upon collection, the additional fees shall be paid by the clerk into that certificate of title administration fund.

The clerk shall make a good faith effort to collect any payment of taxes due but not made because the payment was returned or dishonored, but the clerk is not personally liable for the payment of uncollected taxes or uncollected fees. The clerk shall notify the tax commissioner of any such payment of taxes that is due but not made and shall furnish the information to the commissioner that the commissioner requires. The clerk shall deduct the amount of taxes due but not paid from the clerk's periodic remittance of tax payments, in accordance with procedures agreed upon by the tax commissioner. The commissioner may collect taxes due by assessment in the manner provided in section 5739.13 of the Revised Code.

Any person who presents payment that is returned or dishonored for any reason is liable to the clerk for payment of a penalty over and above the amount of the taxes due. The clerk shall determine the amount of the penalty, and the penalty shall be no greater than that amount necessary to compensate the clerk for banking charges, legal fees, or other expenses incurred by the clerk in collecting the returned or dishonored payment. The remedies and procedures provided in this section are in addition to any other available civil or criminal remedies. Subsequently collected penalties, poundage fees, and title fees, less any title fee due the state, from returned or dishonored payments collected by the clerk shall be paid into the certificate of title administration fund. Subsequently collected taxes, less poundage fees, shall be sent by the clerk to the treasurer of state at the next scheduled periodic remittance of tax payments, with information as the commissioner may require. The clerk may abate all or any part of any penalty assessed under this division.

(F) In the following cases, the clerk shall accept for filing an application and shall issue a certificate of title without requiring payment or evidence of payment of the tax:

- (1) When the purchaser is this state or any of its political subdivisions, a church, or an organization whose purchases are exempted by section 5739.02 of the Revised Code;
- (2) When the transaction in this state is not a retail sale as defined by section 5739.01 of the Revised Code;
- (3) When the purchase is outside this state or in interstate commerce and the purpose of the purchaser is not to use, store, or consume within the meaning of section 5741.01 of the Revised Code;
- (4) When the purchaser is the federal government;
- (5) When the motor vehicle was purchased outside this state for use outside this state;
- (6) When the motor vehicle is purchased by a nonresident under the circumstances described in division (B)(1) of section 5739.029 of the Revised Code, and upon presentation of a copy of the affidavit provided by that section, and a copy of the exemption certificate provided by section 5739.03 of the Revised Code.

(G) An application, as prescribed by the registrar and agreed to by the tax commissioner, shall be filled out and sworn to by the buyer of a motor vehicle in a casual sale. The application shall contain the following notice in bold lettering: "WARNING TO TRANSFEROR AND TRANSFEREE (SELLER AND BUYER): You are required by law to state the true selling price. A false statement is in violation of section 2921.13 of the Revised Code and is punishable by six months' imprisonment or a fine of up to one thousand dollars, or both. All transfers are audited by the department of taxation. The seller and buyer

must provide any information requested by the department of taxation. The buyer may be assessed any additional tax found to be due."

(H) For sales of manufactured homes or mobile homes occurring on or after January 1, 2000, the clerk shall accept for filing, pursuant to Chapter 5739. of the Revised Code, an application for a certificate of title for a manufactured home or mobile home without requiring payment of any tax pursuant to section 5739.02, 5741.021, 5741.022, or 5741.023 of the Revised Code, or a receipt issued by the tax commissioner showing payment of the tax. For sales of manufactured homes or mobile homes occurring on or after January 1, 2000, the applicant shall pay to the clerk an additional fee of five dollars for each certificate of title issued by the clerk for a manufactured or mobile home pursuant to division (H) of section 4505.11 of the Revised Code and for each certificate of title issued upon transfer of ownership of the home. The clerk shall credit the fee to the county certificate of title administration fund, and the fee shall be used to pay the expenses of archiving those certificates pursuant to division (A) of section 4505.08 and division (H)(3) of section 4505.11 of the Revised Code. The tax commissioner shall administer any tax on a manufactured or mobile home pursuant to Chapters 5739. and 5741. of the Revised Code.

(I) Every clerk shall have the capability to transact by electronic means all procedures and transactions relating to the issuance of motor vehicle certificates of title that are described in the Revised Code as being accomplished by electronic means.

Effective Date: 10-21-2003; 09-16-2004; 03-29-05; 06-30-2005; 2007 HB119 09-29-2007

## **4549.46 Written odometer disclosure statement.**

(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.

(B) No dealer or wholesaler who acquires ownership of a motor vehicle shall accept any written odometer disclosure statement unless the statement is completed as required by section 4505.06 of the Revised Code.

(C) A motor vehicle leasing dealer may obtain a written odometer disclosure statement completed as required by section 4505.06 of the Revised Code from a motor vehicle lessee that can be used as prima-facie evidence in any legal action arising under sections 4549.41 to 4549.46 of the Revised Code.

(D) Except as otherwise provided in this division, whoever violates division (A) or (B) of this section is guilty of an odometer disclosure violation, a felony of the fourth degree. If the offender previously has been convicted of or pleaded guilty to a violation of this section or any provision of sections 4549.42 to 4549.451 of the Revised Code, a violation of this section is a felony of the third degree.

Effective Date: 01-01-2004