

IN THE SUPREME COURT OF OHIO

State of Ohio ex rel. Nancy H. Rogers, : Case No. 08-1451
Attorney General of Ohio, :
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 Plaintiff-Appellee, : ON APPEAL FROM THE FRANKLIN
 : COUNTY COURT OF APPEALS, TENTH
 : APPELLATE DISTRICT
 v. :
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 Midway Motor Sales, Inc., et al., : Court of Appeals
 : Case No. 07AP-744
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 Defendant-Appellee, :
 :
 :
 (General Motors Acceptance Corporation, :
 n/k/a GMAC LLC, :
 :
 :
 Defendant-Appellant). :

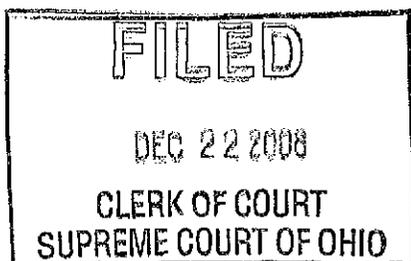
MERIT BRIEF OF AMICI CURIAE
AMERICAN FINANCIAL SERVICES ASSOCIATION AND
ASSOCIATION OF CONSUMER VEHICLE LESSORS
IN SUPPORT OF APPELLANT GMAC

Darrell L. Dreher (0005935)
(COUNSEL OF RECORD)
Vanessa A. Nelson (0072604)
Dreher Tomkies Scheiderer LLP
2750 Huntington Center
41 South High Street
Columbus, Ohio 43215-6196
(614) 628-8000
(614) 628-1600 – Facsimile
ddreher@dltlaw.com
vnelson@dltlaw.com

Attorneys for Amici Curiae
American Financial Services Association and
Association of Consumer Vehicle Lessors

Nancy H. Rogers (0002375)
Attorney General
Benjamin C. Mizer (0083089)
Solicitor General
(COUNSEL OF RECORD)
Stephen P. Carney (0063460)
Deputy Solicitor
Teresa A. Heffernan (0090732)
David M. Dembinski (0006978)
Assistant Attorneys General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215-3428
(614) 466-8980
(614) 466-5087 – Facsimile
bmizer@ag.state.oh.us

Attorneys for Plaintiff-Appellee State of
Ohio ex rel. Nancy H. Rogers, Attorney
General of Ohio



Michael H. Carpenter (0015733)
Jeffrey A. Lipps (0005541)
Angela M. Paul Whitfield (0068774)
Carpenter Lipps & Leland LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, Ohio 43215
(614) 365-4100
(614) 365-9145 – Facsimile
carpenter@carpenterlipps.com
lipps@carpenterlipps.com
paul@carpenterlipps.com

Attorneys For Defendant-Appellant
GMAC LLC

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STATEMENT OF FACTS

The facts of this case are simple: GMAC sold off-lease vehicles that had traveled more miles than reflected on the vehicles' odometers after the leasing dealer tampered with the odometers. GMAC was not involved in the tampering and had no knowledge of it. When GMAC began to suspect possible odometer fraud, it promptly investigated and took immediate corrective action. GMAC notified law enforcement and remediated affected consumers.

The Attorney General nonetheless filed suit against the dealership and GMAC. Count Two of the complaint alleged that GMAC violated R.C. 4549.46 of the Odometer Rollback and Disclosure Act ("ORDA") by failing to provide true odometer disclosures. The Attorney General filed a motion for summary judgment against GMAC on Count Two. Central to that motion was the assumption that R.C. 4549.46 is a strict liability offense. The Franklin County Court of Common Pleas sustained the motion, based on prior Ohio appellate case law stating, in dicta, that R.C. 4549.46 is a strict liability offense. The Attorney General dismissed the complaint's remaining counts against GMAC. The Tenth District Court of Appeals upheld the trial court's grant of summary judgment against GMAC, similarly finding that R.C. 4549.46 is a strict liability offense based solely on prior Ohio cases.

STATEMENT OF AMICI'S INTERESTS

Amicus Curiae American Financial Services Association ("AFSA") is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. For over 90 years, AFSA has provided services to its members. Among its major activities, AFSA deals with all aspects of the legal environment facing the consumer credit industry, including legislative issues, regulatory matters and litigation. AFSA has a division, the Vehicle Finance Division, which is dedicated to auto finance and leasing issues. AFSA encourages and

maintains ethical business practices and supports financial education for consumers of all ages. AFSA represents more than 350 companies nationally engaged in offering motor vehicle financing and leasing to consumers in the United States.

Amicus Curiae Association of Consumer Vehicle Lessors (“ACVL”) has the nation’s leading vehicle lessors as members. The ACVL has as its missions promoting retail automobile leasing, eliminating unfair and deceptive trade practices, increasing the effectiveness of members as competitors and enhancing the public understanding of and satisfaction with automobile leasing. The ACVL has provided leasing information to the Federal Reserve Board that has been incorporated into the FRB’s consumer publications and web site materials. ACVL members originated an estimated 1.6 million leases totaling \$54 billion in 2007.

Because resolution of this case will directly impact Amici’s members, who routinely sell used vehicles and complete Ohio odometer disclosure affidavits, Amici filed a Memorandum in Support of Jurisdiction urging this Court to accept jurisdiction of GMAC’s appeal. Amici now urge the Court to reverse the judgment below so Amici’s members may complete Ohio odometer disclosure affidavits without fear of strict criminal liability.

ARGUMENT

Proposition of Law No. I: R.C. 4549.46(A) is not a strict liability statute.

GMAC has consistently articulated clear and convincing reasons why R.C. 4549.46(A) is not a strict liability statute. R.C. 4549.46(A) provides in pertinent part that “[n]o transferor shall fail to provide the true and complete odometer disclosures required by section 4505.06 of the Revised Code.” GMAC advocates reading the ORDA together with other provisions incorporated by reference (including, but not limited to, R.C. 4505.06, which governs certificates of title) to prohibit only knowing odometer disclosure violations. GMAC’s well-founded

arguments honor the plain language of the statute and the intentions of the General Assembly. In addition to the arguments articulated by GMAC, Amici propose the following additional explanation of why R.C. 4549.46(A) is not a strict liability statute: R.C. 4549.46(A) prohibits only intentional odometer disclosure violations because a violation can be prosecuted criminally (as well as civilly) and the statutory language does not plainly indicate a purpose to impose strict liability. To the contrary, the plain language of R.C. 4549.46, through its incorporation of R.C. 4505.06, plainly indicates a purpose to impose liability for only knowing violations. Thus, whichever explanation this Court accepts, the long-standing but statutorily unjustifiable judicial interpretation of R.C. 4549.46(A) as a strict liability statute must be overturned.

Amici's position is based on two wholly separate propositions: (i) the leading case, *Flint v. Ohio Bell Telephone Co.* (1982), 2 Ohio App.3d 136, is wrong and (ii) R.C. 4549.46(A) must be interpreted according to the rules for construction of criminal statutes.

I. The Leading Case Is Wrong

The origin of the strict liability interpretation is *Flint*, a 1982 opinion of the Ninth District Court of Appeals. While at least two appellate courts have ruled in favor of transferors on odometer disclosure claims without mentioning strict liability or *Flint* (see *Ormston v. Leiken Oldsmobile, Inc.* (Dec. 20, 1991), Lake App. No. 91-L-005; *Dunlap v. Snapp* (June 29, 1987), Champaign App. No. 86-CA-15), most subsequent courts have merely categorically adopted *Flint's* characterization of R.C. 4549.46(A) as a strict liability offense without elaboration or analysis. As explained below, the rationale in *Flint* is fundamentally flawed. Accordingly, *Flint* and all its progeny should be overturned to the extent that they hold that violation of

R.C. 4549.46 is a strict liability offense.¹

A. Why *Flint* Is Wrong

There are four stand-alone reasons why the rationale in *Flint* is flawed. The *Flint* court:

- Improperly inferred that R.C. 4549.46(A) was a strict liability offense because other sections of the ORDA clearly provide for culpable intent and R.C. 4549.46(A) does not;
- Created a new duty on transferors to ascertain actual vehicle mileage, which duty is not based in law or sound public policy;
- Misrepresented the U.S. Supreme Court’s position on strict liability; and
- Failed to address the criminal nature of the statute.

Each of these points is discussed below.

1. The *Flint* Court Improperly Drew a Negative Inference of Strict Liability

The *Flint* court deemed R.C. 4549.46 to be a strict liability offense for several reasons, the first being negative inference: “the absence of a mental element in R.C. 4549.46 where the legislature clearly provided for culpable intent in the preceding sections plainly indicates a legislative purpose to hold transferors who violate R.C. 4549.46 strictly liable for their conduct.” *Flint*, 2 Ohio App.3d at 137. However, as an initial matter, there is no “absence of a mental element in R.C. 4549.46.” Indeed, the statute, and the state-mandated disclosure forms promulgated under the statute, makes it clear that the mental element is actual knowledge.

¹ Although the facts of the *Flint* case are not relevant to our argument, we wish to highlight several significant differences between those facts and the facts of GMAC’s case. *Flint* was a private civil action and not a state action. It involved a single vehicle with a single owner and a single alleged violation of R.C. 4549.46 (i.e., the defendant’s knowing failure to disclose that the odometer had exceeded its mechanical limits and returned to 0 after 99,999 miles). *Flint*, 2 Ohio App.3d at 136. It did not involve a complicated rollback scheme with multiple vehicles and multiple owners, only one of whom knew of the odometer inaccuracies. The *Flint* court likely would have found defendant Ohio Bell liable for violating R.C. 4549.46(A), because of its actual knowledge of the odometer discrepancy, even if it had not employed a strict liability standard, which is definitely not true of GMAC’s case.

Moreover, even if this Court assumed the absence of a mental element—which it should not—omission of a culpable mental state in one part of a law that provides for culpable mental states in other related provisions is insufficient proof of legislative intent to impose strict liability. *State v. Young* (1988), 37 Ohio St.3d 249, 252-253. *Young* focused on R.C. 2907.323(A)(3), which prohibited possession of child pornography without specifying a requisite degree of culpability. In considering the appropriate degree of culpability for R.C. 2907.323(A)(3), this Court looked to the statute as a whole, including the other surrounding sections (R.C. 2907.321 and R.C. 2907.322). *Young*, 37 Ohio St.3d at 252-253. That the surrounding sections contained a scienter requirement (i.e., knowledge) did not persuade this Court to interpret the omission of a culpable mental state in R.C. 2907.323(A)(3) as an indication of legislative intent to impose strict liability. *Id.* Similarly, the perceived absence of an intent element does not permit any negative inference regarding strict liability in R.C. 4549.46(A) merely because other provisions of the ORDA may specify culpable mental states.

2. The *Flint* Court Created a New Duty Not Based in Law or Sound Public Policy

The *Flint* court also invented out of whole cloth a new rule purporting to establish a strict duty upon transferors to ascertain the actual mileage of a vehicle when providing odometer disclosures. *Flint*, 2 Ohio App.3d at 137. This rule has no basis in law; neither the ORDA nor any other Ohio law requires transferors to ascertain the actual mileage of a vehicle.

R.C. 4549.46(A) merely requires transferors to “provide the true and complete odometer disclosures required by [R.C. 4505.06]” (emphasis added). No law, including R.C. 4505.06, requires investigation of the “actual mileage.” In fact, Ohio case law is to the contrary. See, e.g., *Automanage, Inc. v. Beechmont Toyota, Inc.* (Sept. 2, 1992), Hamilton App. No. C-910528 (finding “no basis for imposing a duty on a purchaser of a motor vehicle to conduct a multi-state

search of the vehicle's chain of title"); *Ormston v. Leiken Oldsmobile, Inc.* (Dec. 20, 1991), Lake App. No. 91-L-005 (finding no duty on used car dealers "to recognize any and all possible signs of tampering and any indicators used by every manufacturer of automobiles that identify an odometer as being a replacement unit").

3. The *Flint* Court Misrepresented the U.S. Supreme Court's Position on Strict Liability

Most troublingly, the *Flint* court cited to *Morissette v. U.S.* (1952), 342 U.S. 246, 262, n. 20, claiming that "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." *Flint*, 2 Ohio App.3d at 137. *Morissette*, a case about alleged conversion of federal government property, actually takes no position on the amenability of motor vehicle laws to strict liability. The text to which the *Flint* court refers, footnote 20 of *Morissette*, is merely a citation to a law review article that roughly categorizes "crime without intent" cases. In the sentence preceding footnote 20, the *Morissette* court disparages these cases, lamenting that "exhaustive studies of state court cases [fail to] disclose any well-considered decisions applying the doctrine of 'crime without intent.'" *Morissette*, 342 U.S. at 262. Thus, reliance on *Morissette* as a basis for strict liability under R.C. 4549.46 is wholly misplaced and wrong, as a matter of law.

4. The *Flint* Court Did Not Address the Criminal Nature of the Offense

The *Flint* court's analysis is also glaringly incomplete, because while it did tacitly recognize the criminal nature of R.C. 4549.46 by citing to only criminal cases (including, but not limited to, *Morissette*), it did not analyze or justify the imposition of strict criminal liability.

Although no criminal charges were filed against GMAC, violation of R.C. 4549.46(A) is a criminal offense. The ORDA is in Chapter 4549 of the Revised Code, which is tellingly entitled "Motor Vehicle Crimes." Violation of R.C. 4549.46(A) is an odometer disclosure

violation, a felony of the fourth degree (or third degree for certain repeat offenders).

R.C. 4549.46(D). R.C. 4549.46(A) meets the statutory definition of a criminal offense because it states a positive prohibition and provides a criminal penalty for violation of such prohibition. See R.C. 2901.03(A), (B). That the Attorney General did not charge GMAC criminally or seek criminal penalties against GMAC does not change the fact that violation of R.C. 4549.46(A) is a criminal offense. Criminal actions could be brought against the Amici's members at any time under R.C. 4549.52 for conduct that fully complies with the law. Based on case law precedent, particularly *Flint*, the Amici's members could be subject to strict criminal liability where no such liability should exist based on the plain language of the statute.

B. Why It Matters to Amici and This Court: *Flint* Has Been Cited as Authority for Strict Liability in at Least One Criminal Action, Where Such Standard is Absolutely Inappropriate

Amici's fear of unwarranted strict criminal liability is not purely speculative—an Ohio appellate court actually imposed strict criminal liability for violation of R.C. 4549.46(A) in *State v. Burrell*, Allen App. No. 1-07-52, 2008-Ohio-1785. In this criminal action by a county prosecuting attorney against a used car salesman for violation of R.C. 4549.46(A), the court applied a strict liability standard, specifically citing to *Flint*. *Id.* at ¶20. Such standard is clearly incorrect in a criminal action based on the plain language of the statute. However, since no court has contradicted *Flint* or addressed the criminal nature of this offense, future courts could mistakenly apply the same incorrect standard.

II. The Correct Standard of Liability

Flint has long gone unchallenged and its precedential weight grows heavier with each new citing reference.² In light of the plain language of R.C. 4549.46(A), together with the rules

² As far as Appellant can determine, no transferor found liable for violation of R.C. 4549.46(A) has appealed to this Court on the strict liability issue.

of statutory construction in R.C. 2901.21 and R.C. 2901.04 (see Part II.A below) and guidance gleaned from recent decisions of this Court on strict liability (see Part II.B below), however, it is abundantly clear that R.C. 4549.46(A) is not a strict liability statute. Accordingly, the *Flint* strict liability standard must be overturned and replaced with the actual knowledge standard contained in the predicate statute.

A. Rules of Statutory Construction

1. R.C. 2901.21

Transferors cannot be liable for violation of R.C. 4549.46(A) without proof of mental culpability, i.e., actual knowledge. A person is not guilty of an offense unless, inter alia, the person has the requisite degree of culpability for the offense. R.C. 2901.21(A). “When the section defining an offense does not specify any degree of culpability, and plainly indicates a purpose to impose strict criminal liability for the conduct described in the section, then culpability is not required for a person to be guilty of the offense.” R.C. 2901.21(B) (emphasis added). R.C. 4549.46(A) unquestionably specifies, through its incorporation of R.C. 4505.06, the degree of culpability—actual knowledge—and fails to plainly indicate a purpose to impose strict liability.³ As a result, R.C. 2901.21 clearly establishes that mental culpability is required for liability under R.C. 4549.46(A).

2. R.C. 2901.04

R.C. 4549.46(A) must be liberally construed in favor of transferors. Statutes defining criminal offenses or penalties must be construed strictly against the state and liberally in favor of the accused. R.C. 2901.04(A). The courts below did the opposite, liberally construing the statute

³ The General Assembly knew how to impose liability without proof of mental culpability, i.e., strict liability, when desired. See, e.g., R.C. 4303.202(B), which expressly states that “[t]his division imposes strict liability.” See also R.C. 2925.01(BB), which this Court identified as a perfect illustration of “what R.C. 2901.21(B) calls a ‘purpose to impose strict liability.’” *State v. Lozier*, 101 Ohio St.3d 161, 2004-Ohio-732, at ¶39.

in favor of the state. Liberal construction in favor of the state was impermissible under R.C. 2901.04(A), as a matter of law, because R.C. 4549.46(A) defines a criminal offense.

B. Case Law Guidance

Ohio Supreme Court case law provides the following additional guidance on the proper interpretation of statutes alleged to provide for strict liability: (i) strict liability statutes must plainly indicate the intention to impose liability without proof of mental culpability, (ii) statutory exceptions indicate lack of intent to impose strict liability and (iii) public policy considerations cannot overcome fundamental rules of statutory construction.

1. Strict Liability Statutes Must Plainly Indicate the Intention to Impose Liability Without Proof of Mental Culpability

In *State v. Collins*, 89 Ohio St.3d 524, 2000-Ohio-231, this Court held that, under the rule in R.C. 2901.21(B), a particular child support law is not a strict liability offense because there are no words in that law indicating an intention to impose strict liability. *Collins*, 89 Ohio St.3d at 530. Given the similarity of the language of the child support law in question, R.C. 2919.21(B) (“No person shall abandon, or fail to provide support as established by a court order to, another person whom, by court order or decree, the person is legally obligated to support.”) and the language of R.C. 4549.46(A) (“No transferor shall fail to provide the true and complete odometer disclosures required by section 4505.06 of the Revised Code.”), the result should be the same here. There are no words in R.C. 4549.46(A) that plainly indicate the intention to impose liability without proof of mental culpability. In particular, Ohio courts have held that the word “shall” does not plainly indicate an intention to impose strict liability. See *State v. Moody*, 104 Ohio St.3d 244, 2004-Ohio-6395, at ¶16 (“The fact that the statute contains the phrase ‘No person shall’ does not mean that it is a strict criminal liability offense.”)

In addition, as explained above (see discussion of *Young* in Part I.A.1), negative inference alone cannot, as a matter of law, support a determination of strict liability.

2. Statutory Exceptions Indicate Lack of Intent to Impose Strict Liability

Another important factor in the Court's strict liability analysis has been the existence of statutory exceptions. In *State v. Young* (1988), 37 Ohio St.3d 249, the Court looked to the immediately following provisions (R.C. 2907.323(A)(3)(a) and (b)). *Id.* at 251-252. That these provisions contained "proper purposes" exceptions to liability for morally innocent conduct (e.g., possession of otherwise prohibited materials for bona fide artistic, medical or scientific purposes) signaled to the Court that R.C. 2907.323(A)(3) should be narrowly construed to prohibit only "conduct which is *not* morally innocent, *i.e.*, the possession or viewing of the described material for purient [sic] purposes." *Id.* at 251.

Like the statute construed in *Young*, R.C. 4549.46(A) contains an exception. The second sentence of R.C. 4549.46(A) provides that "[a] 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 [R.C. 4549.42 to R.C. 4549.46], unless the transferor knows of or recklessly disregards facts indicating the violation." This "previous owner" defense in the ORDA is analogous to the "proper purposes" exceptions of the child pornography law in that it sanctions some innocent disclosure errors, which further undermines a strict liability interpretation of the ORDA.

3. Public Policy Considerations Cannot Overcome Fundamental Rules of Statutory Construction

Moreover, a bald assertion that a law furthers some public policy objective does not trump the general rule established by R.C. 2901.21(B). The *Collins* court specifically rejected the state's contention that the public policies underlying the child support law required strict

liability, explaining that “[w]ere 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.” *Collins*, 89 Ohio St.3d at 530.

Thus, this Court should similarly reject the supposed public policy rationale proffered by the Attorney General and decline to write strict liability language into R.C. 4549.46(A). See, e.g., p. 10-11 of Memorandum of Plaintiff-Appellee State of Ohio in Opposition to Jurisdiction, where the Attorney General contends that “[t]he strict liability standard is properly placed into the [ORDA] because of the significant public interest at stake in providing true odometer disclosures.” The Attorney General bases this assertion solely on *Flint* and the language of *Morissette* cited in *Flint*. Even if *Morissette* actually supported the point for which the *Flint* court cited it (see discussion in Part I.A.3 above), the Attorney General’s flimsy public interest justification would not be sufficient grounds for finding strict liability, as a matter of law, based on this Court’s ruling in *Collins*.

III. *Flint* Must Be Overturned; The Tenth District’s Ruling Must Be Reversed

The Tenth District and the trial court interpreted R.C. 4549.46(A) as a strict liability statute based on precedent alone. For the reasons set forth above, the precedent (and, therefore, the Tenth District’s ruling) cannot stand. Accordingly, we invite this Court to overturn *Flint*, reverse the Tenth District and the trial court and clarify the correct standard of liability for R.C. 4549.46(A) violations.

CONCLUSION

Careful and considered analysis of the strict liability issue—which has been sorely lacking in cases construing R.C. 4549.46(A) to date—inevitably leads to a conclusion that R.C. 4549.46(A) is not a strict liability statute. By confirming this conclusion and reversing the Tenth District's and the trial court's judgments against GMAC, this Court will prevent perpetuation of a pervasive misinterpretation and promote certainty and fairness in odometer disclosure disputes.

Respectfully Submitted,



Darrell L. Dreher, Counsel of Record
Vanessa A. Nelson

Attorneys for Amici Curiae American Financial
Services Association and Association of Consumer
Vehicle Lessors

PROOF OF SERVICE

I certify that a copy of this Merit Brief was sent by ordinary U.S. mail on December 22,

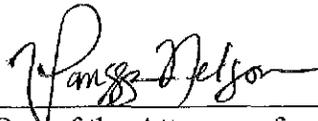
2008 to:

Attorney for Plaintiff-Appellee:

Benjamin C. Mizer (0083089)
Solicitor General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215-3428

Attorney for Defendant-Appellant:

Michael H. Carpenter (0015733)
Carpenter Lipps & Leland LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, Ohio 43215



One of the Attorneys for
Amici Curiae American Financial Services Association and
Association of Consumer Vehicle Lessors