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## INTRODUCTION

Surprisingly, the Attorney General now says the “facts” of GMAC’s story do not matter. The “facts” and story, however, cannot be so easily avoided. They are the Record evidence in this case. GMAC signed truthful disclosures in the form of the mandatory affidavit prescribed by the Registrar of the State of Ohio Bureau of Motor Vehicles (“Registrar”). On those undisputed Record facts, GMAC was wrongly sued and wrongly found civilly “guilty”.

Even more surprisingly, the Attorney General says the Registrar’s mandatory form of affidavit is irreconcilable with the strict liability of O.R.C. § 4549.46(A). The Attorney General is wrong again. The Registrar’s mandatory affidavit is completely consistent with the plain language and legislative history of O.R.C. § 4549.46(A). The only thing irreconcilable with the Registrar’s mandatory affidavit is the wrongful strict liability interpretation of O.R.C. § 4549.46(A) by the Attorney General in this matter.

Notwithstanding the Attorney General's valiant efforts, he cannot establish that O.R.C. § 4549.46(A) is a strict liability statute. The plain language of O.R.C. § 4549.46(A) expressly incorporates a mental state through its express reference to the odometer disclosure requirements set forth in O.R.C. § 4505.06. O.R.C. § 4505.06 expressly requires the Registrar to promulgate a mandatory odometer disclosure affidavit form that vehicle transferors must complete. That mandatory disclosure affidavit has sought, and still does seek, a statement by the transferor that the mileage listed on the affidavit is accurate "to the best of [the transferor's] knowledge."

Perhaps most important is the fact that the Attorney General is not entitled to prosecute this action based on altered evidence. Make no mistake, the Attorney General’s case depends on altered evidence. The mandatory disclosure affidavit needs to be altered to remove the words “to the best of my (our) knowledge” to make the GMAC affidavits false and thereby manufacture a

violation of the Odometer Rollback and Disclosure Act ("Odometer Act"). But, GMAC did not sign any of the so altered affidavits. Instead, GMAC truthfully represented the mileage on the vehicles "to the best of [its] knowledge" on the form presented by the Registrar. In short, the Attorney General cannot prosecute this action on an altered disclosure; it must prosecute this action on the actual disclosures of Record. Using those disclosures, GMAC committed no violations.

It is time for this Court to correct the misinterpretation of the plain language of O.R.C. § 4549.46 (A). The General Assembly has written a statute that is neither strict liability, nor written in an irreconcilable fashion. The ruling of the Tenth District Court of Appeals ("Tenth District") should be reversed.

### 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.**

**A. There Is No Plain Indication That The Legislature Intended O.R.C. § 4549.46(A) To Be A Strict Liability Statute.**

The Attorney General correctly cites to State v. Collins (2000), 89 Ohio St.3d 524 and O.R.C. § 2901.21 as to the rigorous standard for determining whether a statute imposes strict liability. (Attorney General Merit Brief ("AG Brief") at 10). This Court held in Collins that:

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.

Id. at 530 (Emphasis Added). Here, there is no plain indication that O.R.C. § 4549.46(A) is a strict liability statute. In fact, the exact opposite is true. The language of the statute plainly incorporates a knowledge element. O.R.C. § 4549.46(A) 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). Pursuant to O.R.C. § 4505.06(C)(1), the Registrar has issued a mandatory form for use by all vehicle transferors. (Supp. 153).<sup>1</sup> That mandatory affidavit 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 . . . (Emphasis Added)

Similar to O.R.C. § 4549.46(A), the statute at issue in Collins (O.R.C. § 2919.21(B)) reads: "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." This Court held this language insufficient to make O.R.C. § 2919.21(B) a strict liability statute. In a more recent case, this Court reaffirmed the holding in State v. Collins with respect to another

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<sup>1</sup> This Court must recognize the incorporation by reference of O.R.C. § 4505.06(C)(1) in O.R.C. § 4549.46(A). See 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)(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.") This Court must also recognize that "administrative regulations issued pursuant to statutory authority have the force and effect of law." Lyden v. Tracy (1996), 76 Ohio St. 3d 66, 69.

statute (former O.R.C. § 2919.24(A)) that included the same "No person shall...." language as the statute at issue in Collins:

The wording of former R.C. 2919.24 is clear and unambiguous. The statute, does not specify a degree of mental culpability. Nor does it plainly indicate a purpose to impose strict liability. \*\*\* In fact, if we were to interpret former R.C. 2919.24 in the manner suggested by the state, we would be violating well-settled principles of statutory construction by failing to construe the statute as written.

State v. Moody (2004), 104 Ohio St.3d 244, 247 (emphasis added).<sup>2</sup> Similarly, interpreting O.R.C. § 4549.46(A) in the manner suggested by the Attorney General here would lead this Court to violate "well-settled principles of statutory construction by failing to construe the statute as written." This is particularly true inasmuch as the Registrar read the statute in order to develop the disclosure affidavits. Rather than strict liability, the Registrar's understanding of the statute as written, based on the mandatory disclosure affidavit it developed, was one that had a mental requirement to it. Relying on this knowledge element, GMAC completed the affidavits "to the best of [its] knowledge." These disclosures were not "inaccurate" as the Attorney General wrongly claims. (AG Brief at 5-6). They were in fact an accurate reflection of the odometer readings at the time of transfer which GMAC, "to the best of [its] knowledge," believed were the accurate readings.

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<sup>2</sup> O.R.C. § 2901.21(B), another statute cited by the Attorney General, is also fatal to his position. Under that statute, an offense carries strict liability only if both of the following are true: (1) the section defining the offense does not specify any degree of culpability; and (2) the section defining the offense plainly indicates a purpose to impose strict liability for the conduct described in the section. Here, O.R.C. § 4549.46(A) does specify knowledge as to the degree of culpability by its express incorporation of O.R.C. § 4505.06(A) which, in turn, incorporates the Registrar's mandatory odometer disclosure affidavit that contains a knowledge element. This, coupled with the lack of any indication, let alone a plain one, of an intent to impose strict liability, forecloses any reliance by the Attorney General on O.R.C. § 2901.21(B).

At the end of the day, this Court should be guided in its decision-making by the statutory language and this Court's own jurisprudence concerning when a statute should be found to impose strict liability. This guidance necessitates a finding in favor of GMAC.

**B. The Existence Of Mental States In The "Previous Owner" Provision In O.R.C. § 4549.46(A) And In Other Provisions Of The Odometer Act Do Not Alter The Conclusion That Strict Liability Does Not Apply To The Conduct Of GMAC.**

To reach its desired result, the Attorney General asks this Court to read the first sentence of O.R.C § 4549.46(A) in conjunction with other provisions of the Odometer Act. This approach need not be taken here. Indeed, "[i]t is a fundamental principle of statutory construction that where the meaning of a statute is clear and definite, it must be applied as written." Kimble v. Kimble (2002), 97 Ohio St. 3d 424, 425. Based on Kimble, this Court need not consider other interpretive methods since the language of O.R.C. § 4549.46(A) is itself clear and definite.

The use of the "to the best of my (our) knowledge" language in the odometer disclosure affidavit form developed by the Registrar, the very administrative agency charged with promulgating the form, is a compelling indication of an intent not to impose strict liability. Indeed, the Assistant Chief for the Title Division of the Bureau Of Motor Vehicles, Debbie Couch, testified at her deposition in this case that the odometer disclosure affidavit is premised upon the transferor's knowledge. (Couch Tr., at 15; Supp. 243). This action on the part of the Registrar is consonant with the legislative history which demonstrates that there was an intent all along for O.R.C. § 4549.46(A) not to be a strict liability statute. (GMAC Merit Brief ("GMAC Brief") at 16-17).

There is also no merit to the Attorney General's argument that the "previous owner" defense would make "no sense unless the baseline prohibition imposes strict liability." (AG Brief at 12). The "previous owner" defense is a statutory "belt and suspenders" carve out that

saves a transferor from downstream liability based on the conduct of a certain category of perpetrator, namely, a previous owner. That defense focuses not on the state of mind of the transferor at the time of the odometer disclosure, but is rather an after-the-fact mechanism for cutting off downstream liability for an innocent transferor like GMAC where the violation is perpetrated by a previous owner. Giving an innocent transferor, like GMAC, a second defense actually is clear evidence the statute is not meant to be strict liability. Indeed, the Odometer Act is riddled with exceptions all meant to protect an innocent transferor, not punish it.

Unable to refute this clear demonstration that a knowledge element is included in the statute, the Attorney General wants this Court to affirm the Tenth District simply because a mental state is spelled out in the "previous owner" defense. The existence of the "previous owner" provision, however, does not lead to the conclusion that O.R.C. § 4549.46(A) imposes strict liability. It is important to note that in making this argument, the Attorney General seeks to have it both ways. Indeed, he wants GMAC to be saddled with strict liability under O.R.C. § 4549.46(A) because of the verbiage in the previous owner provision but, at the same time, does not want GMAC to be able to assert that previous owner defense. (AG Brief, Proposition of Law No. 3). This Court should not accept the Attorney General's self-serving application of the statutes. There is nothing inconsistent in the two provisions or in the way that GMAC is entitled to rely upon them in this case, particularly given the misapplication by the Attorney General.<sup>3</sup>

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<sup>3</sup> In a further attempt to manufacture an inconsistency, the Attorney General claims that because of the inclusion of a recklessness element in the "previous owner" sentence, GMAC's argument that the first sentence of the statute contains a knowledge element would render the two provisions inconsistent. (AG Brief at 15). The Attorney General is wrong in this regard. The two provisions focus on different conduct. And, simply because the "previous owner" defense cannot be invoked if a transferor is reckless, does not affect the knowledge requirement for the mileage disclosure for a vehicle transfer.

The Attorney General also erroneously contends that because express mental states are specified in other provisions of the Odometer Act, then the "choice to *omit* a mental state in [O.R.C. § 4549.46(A)] was surely not accidental." (AG Brief at 17). This contention misses the mark. It assumes the absence of a mental state. As noted earlier, that assumption is wrong. With the other sections of the Odometer Act referenced by the Attorney General containing a mental state, it would not make sense that only § 4549.46(A) would be devoid of one.

The Attorney General also wrongly contends that O.R.C. § 4549.45 is consistent with O.R.C. § 4549.46(A) only if the latter imposes strict liability. (AG Brief at 18). However, simple logic dictates that the opposite is true. Following the logic of the Attorney General, someone without knowledge that odometer tampering occurred could be found not guilty under O.R.C. § 4549.45 (which includes a mental state element), but could be found strictly liable under O.R.C. § 4549.46(A) merely for providing a disclosure "to the best of my (our) knowledge" that turns out was incorrect because of odometer tampering perpetrated by another entity. To the extent that these two statutes are "parallel offense[s]" according to the Attorney General (AG Brief at 18), then liability under them should be consistent. Significantly, GMAC's interpretation makes them consistent, while the Attorney General's does not.

In a sizable section of its Brief, the Attorney General references this Court's earlier strict liability jurisprudence to support its unfounded claim that because of the language of other provisions of the Odometer Act, the provision at issue here (§ 4549.46(A)) imposes strict liability. Both those statutes and the embedded statutory schemes differ from those presently before this Court, thereby rendering them inappropriate:

- For example, in State v. Fairbanks (2008), 117 Ohio St. 3d 543, 2008-Ohio-1470, ¶11, the provision in question, O.R.C. § 2921.331(C)(5)(a)(ii), was a "penalty enhancement" provision that was "contingent upon a factual finding with respect to the result or consequence of the defendant's willful conduct." By stark

contrast, O.R.C. § 4549.46(A) actually forms the basis for the penalty here and thus is not a penalty enhancement provision.

- Similarly, State v. Maxwell (2002), 95 Ohio St. 3d 254, 256 involved strict liability only where an initial, knowing bad act was perpetrated.
- Finally, both State v. Wac (1981), 68 Ohio St. 2d 84 and State v. Schosser (1997), 79 Ohio St. 3d 329 involved statutes that did not incorporate a mental state like O.R.C. § 4549.46(A). Schosser also had evidence of a legislative intent to impose strict liability, in stark contrast to the legislative history for O.R.C. § 4549.46(A). In fact, the legislative history for O.R.C. § 4549.46(A) actually evidences that the General Assembly did not intend to impose strict liability. (GMAC Brief at 16-17). Even the Attorney General admits differences exist inasmuch as he highlights the fact that other sections of the Act *do* have mental states. (AG Brief at 15-17).<sup>4</sup>

Simply stated, the Attorney General cannot hide behind distinguishable precedent to support its claim that O.R.C. § 4549.46(A) imposes strict liability.

**C. The Language Of The Odometer Disclosure Affidavit Form Is Incorporated Into The Language Of O.R.C. § 4549.46(A).**

Knowing that a conclusion by this Court that the "to the best of my (our) knowledge" language of the Registrar's mandated odometer disclosure affidavit form is incorporated into the statute spells doom for the Attorney General in this appeal, various arguments are conceived by the Attorney General to defeat such incorporation.

First, contrary to the Attorney General's contentions, the language of the affidavit form does not conflict with the language of O.R.C. § 4505.06(C)(1). O.R.C. § 4549.46(A) references that section and requires the Registrar to promulgate 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). That is exactly what the Registrar did and has

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<sup>4</sup> Moreover, the Schosser court analogized to federal racketeering laws in determining the applicable mental state for Ohio's state law counterpart. Applying this approach to this case, the federal odometer disclosure regulations require a vehicle transferor to provide a knowledge-based certification of the vehicle's odometer reading and its reliability. 49 CFR 580.5 (2008).

been doing for 20 years—promulgating an affidavit in which the affiant “swears.” If the form of the affidavit were faulty, certainly the Attorney General, which advises the Registrar, or the General Assembly, which wrote the statute, or the Bureau of Motor Vehicles, whose employees drafted the regulation, would have changed it by now. After all, this case has been pending for four years, and they have all been on notice of GMAC's position since its filing. Clearly, there is no inconsistency between the statute and the affidavit. The legislative history of O.R.C. § 4505.06 itself shows a mental state element:

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. (emphasis added). The “statement just described” is based on the transferor's knowledge. Thus, there is no clear conflict here. The Legislature itself intended that the “true odometer reading” language in the statute is fulfilled by a certification by the transferor that the reading is true to the best of the transferor's knowledge.

Second, the Attorney General argues that because the form affidavit has existed for many years alongside judicial strict liability interpretations, the Legislature has essentially endorsed the strict liability approach and the view that the form presents no conflicts. (AG Brief at 25). How odd. Under this approach, no judicial decision would ever be wrong so long as the legislature did not amend the statute. The Attorney General ignores the fact that none of the previously-

decided cases addressed whether the knowledge element of the affidavit form is incorporated in O.R.C. § 4549.46(A). That fact or the facts present here simply were never before them. (GMAC Brief at 18-20). Thus, it is just as likely as not that the Legislature may have concluded it need not take any affirmative action in light of those decisions. In any event, given the legislative history here and the plain language of the statute, to the extent that the Legislature has not yet taken any action, 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.

Finally, the Attorney General wants this Court to believe that such an incorporation "cannot possibly be right" based on the same argument it makes earlier about a purported inconsistency in this statute. (AG Brief at 26). As discussed above, there is no inconsistency. (Pages 5-7, supra). Any attempt to manufacture one should be rejected, and this Court should simply apply the language of O.R.C. § 4549.46(A) exactly as it reads.

At the end of the day, the Attorney General fails to provide a basis upon which to demonstrate this Court may ignore the plain language of O.R.C. § 4549.46(A) and its incorporated knowledge element. While the Attorney General may want this Court to read that language out, it is axiomatic that this Court must give effect to all language in a legislative enactment. D.A.B.E., Inc. v. Toledo-Lucas County Bd. of Health (2002), 96 Ohio St. 3d 250, 256 (internal citations omitted)("words in statutes should not be construed to be redundant, nor should any words be ignored. Statutory language must be construed as a whole and given such interpretation as will give effect to every word and clause in it.")

**D. The Attorney General's Policy-Based Arguments Cannot Trump The Express And Unambiguous Language Of O.R.C. § 4549.46(A).**

This Court in Collins, *supra*, stated:

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.

89 Ohio St.3d at 529. Thus, even if it is assumed for the sake of argument that there was some valid public policy consideration justifying the punishment of innocent entities like GMAC through a strict liability interpretation of O.R.C. § 4549.46(A), it would still be necessary to examine the language of the statute for its plain meaning. This Court cannot, at the behest of the Attorney General, write language into the provision that could have been included, but was not.

While the Attorney General claims that a strict liability interpretation is necessary to advance a public policy of protecting consumers, the Attorney General here has effectively disavowed pursuing claims on behalf of consumers in this action. If he were protecting consumers, the Attorney General would have taken affirmative steps to investigate and prosecute: (i) Midway's owners, officers, and directors; (ii) the manufacturer of the device used by Midway to roll back the odometers; and (iii) odometer tampering complaints lodged by other consumers who acquired vehicles from Midway but were not Affected Vehicles. The Attorney General, however, did none of those things.<sup>5</sup> Thus, if the purpose of O.R.C. § 4549.46(A) were

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<sup>5</sup> (Deposition of Sheila Laverty ("Laverty Tr.") (investigator for Attorney General) at 131-34; Supp. 87-90 (did not seek to interview Mr. Mercure from Midway or investigate the auction houses to determine what inspections were done); at 73-76; Supp. 77-80 (no effort to investigate and/or prosecute the manufacturer or supplier of the device used to roll back the odometers of the Affected Vehicles); see also Investigative Report of Phone Call from FBI Agent Wally Sines, Appendix BB to GMAC Brief in Appeals Court) (providing information regarding manufacturer of device used by Midway); Deposition of Robert Lombardo (employee in Attorney General's Consumer Protection Section)("Lombardo Tr.") at 28-29, 31-32, 36, 64, 95-96, 100-01, 113-14,

truly to protect consumers, the Attorney General would have taken those actions instead of bringing suit against GMAC, an innocent party that actually did protect consumers by making voluntary remediation payments to the tune of \$1.2 million.

Adding to the incongruous nature of the Attorney General's actions, among the consumers supposedly protected by imposing strict liability against an innocent GMAC is the perpetrator Midway. Indeed, GMAC actually was found civilly guilty under O.R.C. § 4549.46(A) for giving a "false" odometer disclosure statement to Midway, the previous owner that altered the odometers in the first instance. (Lavery Tr. at 86-87; Supp. 81-82; Lombardo Tr. at 56-58; Supp. 116-118; Exemplar Vehicle Title History; Supp. 144).

Under O.R.C. § 1.47(C), this Court should, in construing O.R.C. § 4549.46(A), presume that the Legislature intended a "just and reasonable result." A finding of liability against GMAC is plainly not a "just and reasonable result" under the circumstances present here. At the end of the day, GMAC, a victim of Midway, was wrongly singled out by the then Attorney General, and no subsequent Attorney General has put an end to this.

Much of the Attorney General's policy-based arguments -- and its case as a whole -- are built on a single appellate court decision, Flint v. Ohio Bell Tel. Co. (1982), 2 Ohio App. 3d 136. However, as GMAC and the *amici* have persuasively shown, Flint is not applicable here, and indeed, was wrongly decided. (GMAC Brief at 18-19; Amicus Brief of American Financial Services Association and Association of Consumer Vehicle Lessors at 3-7).

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121-22, 131-32, and 137-38; Supp. 110-11, 112-13, 114, 119, 125-26, 127-28, 130-31, 132-33, 137-38). The failure to assist consumers is manifest in the conduct of the Attorney General. On at least one occasion, the Attorney General specifically told a consumer who had a complaint against Midway for odometer tampering that he could not help that consumer unless GMAC was involved. (Lavery Tr. at 50-52; Supp. 71-73). The Attorney General, the protector of consumer interests in Ohio, completely ignored consumers' pleas for aid, despite urging consumers to contact him if they believed they had a vehicle with a tampered odometer. (Lombardo Tr. at 113-14; Supp. 130-31).

In his brief, the Attorney General seizes on Flint's discussion of the strict liability nature of the Consumer Sales Practice Act (CSPA) and argues that strict liability should also apply here. (AG Brief at 19). Importantly, the CSPA, unlike the Odometer Act, is a remedial, and not a penal, statute. Thus, under the Collins requirement of a plain indication of strict liability, the Attorney General's simple comparison to a non-penal statute is unpersuasive.

The Attorney General's reliance on Flint's reference to the Supreme Court decision in Morrisette v. U.S. (1952), 342 U.S. 246 is misplaced. (AG Brief at 19-20). Footnote 20 of the Morrisette decision is merely a citation to a law review article that categorizes "crime without intent" cases into some rough subdivisions, one of which relates to motor vehicle laws. There is no indication, however, that this broad category of motor vehicle laws included, or even contemplated, odometer disclosure/tampering laws. Not surprisingly, the Attorney General ignores Morrisette's admonition that we cannot assume that legislative silence indicates an intention to impose strict liability. 342 U.S. at 256 n. 14, 263. Of course, as noted above, the General Assembly was not silent here. Both the plain language of the incorporated affidavit and the legislative history reflect the intent to include a mental state requirement in O.R.C. § 4549.46(A).

Pulling out all the stops, the Attorney General next argues that difficulties in determining subjective intent would make the Odometer Act "virtually unenforceable." (AG Brief at 19). Not surprisingly, the Attorney General provides no explanation as to why the Odometer Act is enforceable as to other sections with a mental state requirement, yet unenforceable as to O.R.C. § 4549.46(A). The Attorney General's contention that the imposition of strict liability here is the only way to protect consumers is equally baseless. There are other sections of the Odometer Act that protect consumers, but still possess a mental state requirement.

As to Flint, there is an undeniable, distinguishing Record fact: GMAC had no knowledge of the odometer tampering perpetrated by Midway or of any facts indicating a violation of the law, while the defendant in Flint had the means of knowing about the facts of the violation as it was in possession of the vehicle.<sup>6</sup> Thus, at the end of the day, the Attorney General's unenforceability concerns are unfounded. As with any penal statute, in each case, a finder of fact will examine the facts and determine whether or not a transferor truthfully completed the odometer disclosure affidavits to the best of their knowledge.

This Court should reject out of hand the Attorney General's claim that GMAC's efforts to distinguish prior, inapposite precedent (mostly guided by Flint) are "policy-based reasons for an exception *on its facts*" and are "not legal distinctions." (AG Brief at 23). Well, GMAC necessarily was prosecuted on "its facts", and despite all his power, even the Attorney General is not entitled to alter those "facts" or create his own convenient set of facts. All along the way, GMAC pointed out that the prior cases cited by the Attorney General did not address the same legal arguments made by GMAC in this case. GMAC's references to the facts of those cases consistently illustrated why an unthinking application of those cases would be inappropriate and would not comport with the language of O.R.C. § 4549.46(A). Unfortunately, to this point, GMAC's effort was to no avail. This Court should not be persuaded by the Attorney General's

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<sup>6</sup> While the Attorney General claims that GMAC could have "performed better due diligence" by obtaining warranty records from GM, a matter unsupported by any Record evidence, the Attorney General concedes that those records belonged to GM, not GMAC. (AG Brief at 20-21). This argument should be stricken as lacking any factual Record support. The Attorney General also ignores the fact that Ohio law imposes no duty to investigate for odometer tampering, absent obvious irregularities. Ormston v. Leiken Oldsmobile, Inc., 1991 Ohio.App. LEXIS 6149 (Lake December 20, 1991). The Attorney General alleged no obvious irregularities regarding the vehicles at issue. Thus, there would have been no reason for GMAC to check the warranty records. Also, at a minimum, whether checking warranty records bears upon GMAC's knowledge in completing the odometer disclosure affidavits is a question for the jury and not one for affirmative summary judgment.

gratuitous citation to the non-controlling rulings of Ohio appeals courts. (AG Brief at 11). None of those cases addressed the argument made by GMAC, *i.e.*, that a knowledge element is incorporated in O.R.C. § 4549.46(A). Moreover, like a snowball rolling downhill, nearly all of the cases relied on a rote application of pure dicta in Flint. And, as previously noted, this prior precedent did not involve a situation where a completely innocent party like GMAC was found strictly liable. The facts in each case involved parties who either tampered with the odometers themselves, knowingly provided false disclosures, and/or had possession of the vehicles.

The Attorney General believes that because of the broad remedial powers that are available to a trial court interpreting the statute, an appropriate remedy can be tailored by the trial court to correct unjust results, including the suspension of statutory penalties, as the trial court did in this case. (AG Brief at 21). What the Attorney General fails to answer, however, is why an innocent party such as GMAC should go through an ordeal that damages its reputation as a good corporate citizen, forces the expenditure of thousands of dollars in legal fees, and labels it an odometer disclosure violator. While civil penalties were suspended here, that is small comfort and no guarantee that all courts will exercise their discretion in that way. Rather than reach such a point of uncertainty and subject an innocent party to the burden of litigation, there should be a definite basis for liability in the first place; something clearly lacking here.

Finally, while the Attorney General calls for this Court to defer to the General Assembly to "narrowly tailor an exception...to cover...whatever situations call for reform," this is not one of those situations. (AG Brief at 22). GMAC does not dispute the general proposition that it is not the function of the Court to usurp the policy-making function of the Legislature. *See, e.g., State ex rel. Cincinnati Enquirer v. Jones-Kelley* (2008), 118 Ohio St. 3d 81, 91 ("the General Assembly is the ultimate arbiter of policy considerations relevant to public-record laws"). But

that is not what this Court would be doing if it reverses the Tenth District. It would merely be enforcing the language of O.R.C. § 4549.46(A) as written, and in the process, giving effect to the Legislature's intent as reflected in the plain language and legislative history.

**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.**

The Attorney General's rebuttal to this Proposition of Law No. 2 is little more than an outgrowth of his position on strict liability. Simply stated, the Attorney General believes that since the first sentence of O.R.C. § 4549.46(A) imposes strict liability, then there is no entrapment because GMAC was never induced to commit an illegal act. The Attorney General could not be more wrong. It is the ultimate inducement for the State to require GMAC to fill out State-mandated and issued odometer disclosure affidavit forms, which forms included the "to the best of my (our) knowledge" language, and then to declare that GMAC's completion of them, with the "to the best of [its] knowledge" provision removed after the fact, was illegal. While the Attorney General contends that the State sought to have GMAC complete the forms "truthfully," GMAC did complete the forms truthfully, *i.e.*, to the best of its knowledge. What GMAC did not know was that the State would later bring suit claiming that this truthful disclosure actually constituted an illegal act under O.R.C. § 4549.46(A) because the Attorney General is removing the "to the best of my (our) knowledge" provision. Therefore, at the end of the day, GMAC, on the basis of altered evidence in the form of the removal of the "to the best of my (our) knowledge" provision, was the subject of entrapment by the State.

In its Merit Brief, GMAC also argued that the Attorney General, by leading GMAC to believe 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 engage in

voluntary remediation efforts, violated GMAC's due process rights by later seeking to punish GMAC for conduct previously endorsed. (GMAC Brief at 24-25). The Attorney General argues that the entrapment defense is not applicable here inasmuch as the conduct on the part of the Attorney General occurred after the alleged odometer disclosure violations occurred. In fact, GMAC is simply arguing that -- separate and apart from the elements for the defense of entrapment -- its due process rights were violated by this conduct on the part of the State. This argument is based on the authority provided by the United States Supreme Court in U.S. v. Laub (1967), 385 U.S. 475, 487 (emphasis added):

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"

Rather than being a strict entrapment argument, GMAC was simply stating that the State cannot, on the one hand, encourage remediation efforts, but then, on the other hand, initiate a suit against GMAC to punish it. This conduct is a violation of GMAC's due process rights.

**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:

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). While the Attorney General claims that the Tenth District and the trial court both applied the statute pursuant to its plain meaning to deny GMAC its right to assert the "previous owner" defense (AG Brief at 30), that is not the case. The undisputed facts show that Midway was "a previous owner" that rolled back and/or tampered with the odometers of the Affected Vehicles. GMAC did not know, have reason to know, or disregard any facts that would have revealed the wrongful actions of Midway. Under those undisputed facts, the plain meaning of the "previous owner" exception would apply to immunize GMAC from liability. Knowing the dispositive nature of GMAC's argument, the Attorney General tries to write into the statute a new feature: namely, that a "previous owner" had to own the vehicle at the time of rollback. Nowhere does the statute contain a temporal element even suggesting that the "previous owner" must own the vehicle at the moment of rollback. Rather, the statute only requires "a previous owner" to be the perpetrator of the wrongdoing. It is undisputed Midway is "a previous owner" of all those vehicles and is the wrongdoer. As such, the previous owner defense prescribed by O.R.C. § 4549.46(A) protects GMAC from liability under that statute.<sup>7</sup>

The realities of leasing transactions underscore the legitimacy of the General Assembly's inclusion of the previous owner defense. A particular vehicle will be titled to multiple entities over its life span, from the manufacturer, to the dealer, to the finance company, to an auctioneer, to a dealer and ultimately to consumer(s). As was seen here, the vehicle could

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<sup>7</sup> 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).

be titled with the finance company while still being in the possession of the dealer. In such a case, if that dealer, who was in fact a previous owner of the vehicle, engages in odometer tampering, the previous owner defense should be available to an unknowing transferor, regardless of whether the vehicle was technically owned by it at the time of the tampering. As occurred here, it is not uncommon for a dealer to touch a vehicle multiple times during the vehicle's life. Taking the Attorney General's (incorrect) position leads to a wholly unacceptable result whereby a prior owner-perpetrator suddenly becomes a wronged party later in the title chain. That is what happened here when Midway bought back some of the vehicles with altered odometers. While the Attorney General paints such a scenario as being a "coincidence" (AG Brief at 32), this is exactly what happened under the facts of this case, and is susceptible to happening in the future given the realities of leasing transactions. The mechanism of the previous owner defense is designed to protect an unknowing transferor of a vehicle from the misconduct of a previous owner who rolls back an odometer so as not to violate contractual mileage limits on leased vehicles.<sup>8</sup> The statute plainly says so.

The Attorney General also claims accepting GMAC's position would lead to anomalous results. That is not so. In the Tenth District's hypothetical quoted by the Attorney General at Page 31 of his Brief, the court posed a scenario where a vehicle transferor could be found strictly liable if the odometer is tampered with by a third party (not a previous owner) during the time it owns a vehicle, while that same transferor would not be found liable if a previous owner had

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<sup>8</sup> The Attorney General would like this Court to believe that odometer tampering "requires sophisticated contraband tools and software" and thus is not susceptible to occurring frequently (AG Brief at 22 n.1). However, Robert Lombardo, the previously-referenced employee in the Attorney General's Consumer Protection Section, testified that an FBI agent told him that the owner of Midway purchased a software package from a company in Canada that would allow the mileage to be altered. (Lombardo Tr. at 31-32; Supp. 112-13). Mr. Lombardo stated that he was directed to a website where the software was offered. There is no evidence that this software was difficult to use or prohibitively expensive.

performed the same act of odometer tampering. This hypothetical, however, is a manufactured anomaly. It wrongly assumes that O.R.C. § 4549.46 imposes strict liability. O.R.C. § 4549.46 clearly has a knowledge element, so long as the form of affidavit prescribed by the Registrar provides "to the best of my (our) knowledge." As such, the transferor whose odometer is tampered with, without his or her knowledge, during the time he or she owns the vehicle, would not be held liable under the hypothetical posed by the Tenth District. Likewise, the unknowing transferor who transfers a vehicle that a previous owner tampered with would also not be liable. The position advocated by GMAC is entirely consistent, clearly grounded in the plain language of the statutes, and does not lead to anomalous results.

While the Attorney General looks to Hughes v. Miller (Putnam 1991), 72 Ohio App. 3d 633, 638 for support that the "previous owner" defense does not apply to GMAC (AG Brief at 30), that case did not involve odometer rollbacks that were perpetrated by "a previous owner" without the knowledge of the current owner. To the extent that Hughes did not address that scenario, it does not have any precedential value for this Court.

### **CONCLUSION**

For the foregoing reasons and for the reasons stated in its Merit Brief, 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.

Respectfully Submitted,



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**CERTIFICATE OF SERVICE**

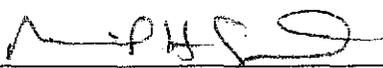
I hereby certify that a true copy of the foregoing Reply Brief of Appellant GMAC LLC was served, this 2<sup>nd</sup> day of March, 2009, upon the following via regular, U.S. mail, postage prepaid:

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