

IN THE SUPREME COURT OF OHIO

**REYNOLD WILLIAMS, JR.,** :  
:   
APPELLEE : Supreme Court Case No. 08-1337  
:   
- VS. - : ON APPEAL FROM THE STARK  
: COUNTY COURT OF APPEALS,  
SPITZER AUTOWORLD CANTON, LLC, : FIFTH APPELLATE DISTRICT  
:   
APPELLANT : Court of Appeals Case No. 07CV00187

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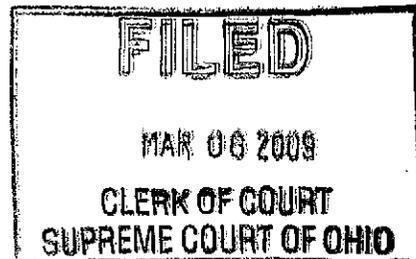
**MERIT BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF  
CONSUMER ADVOCATES AND OHIO ASSOCIATION FOR JUSTICE AND  
STARK COUNTY ASSOCIATION FOR JUSTICE  
IN SUPPORT OF PLAINTIFF-APPELLEE REYNOLD WILLIAMS, JR.**

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## STATEMENT OF INTEREST OF AMICUS CURIAE

The National Association of Consumer Advocates (“NACA”) is a non-profit association of consumer advocates committed to representing customers’ interests. Its members are made up of law professors, law students, public and private sector attorneys, and legal services attorneys whose primary focus is the protection of consumers in a free marketplace. NACA’s mission is to promote justice for consumers by serving as a resource and voice for consumers and its membership in the ongoing struggle to curb unfair or abusive practices that injure consumers and interfere with fair competition in the marketplace.

The Ohio Association for Justice (“OAJ”), formerly the Ohio Academy of Trial Lawyers, was founded in 1954 and is comprised of approximately 2,000 Ohio attorneys practicing personal injury and consumer law in the State of Ohio. The OAJ and its members are dedicated to preserving the rights of Ohio consumers, workers, and families, and to promoting public confidence in the judicial system.

The Stark County Association for Justice (formerly the Stark County Academy of Trial Lawyers) is an association of attorneys dedicated to advancing the cause of those who are damaged in person and property, to protecting the civil justice system and resisting efforts to reduce, limit or remove the rights of individuals who seek remedy through the civil justice system.

The *Amicus Curiae* are intervening in this appeal on behalf of Plaintiff-Appellee Reynolds Williams, Jr. an Ohio consumer. The question before this Court is whether oral representations and promises made by suppliers to Ohio consumers, in connection with a consumer transaction, are admissible where the representations and promises are

inconsistent with a written agreement. In a breach of contract claim, the parol evidence rule would exclude inconsistent representations and promises. However, the parol evidence rule does not apply to a statutory claim brought under the Ohio Consumer Sales Practices Act (“CSPA”). In a CSPA claim, the evidence is offered not to contradict the contract but instead is offered to prove an unfair, deceptive, or unconscionable act was committed in violation of the CSPA. The two types of claims are different.

The CSPA was enacted by the Ohio Legislature in 1972 and substantially follows the language of the Uniform Consumer Sales Practices Act approved by the National Conference of Commissioners on Uniform State Laws and the American Bar Association in 1970. It was subsequently amended in 1971 and similarly approved.

Just as the uniform statute also intended, the Ohio CSPA protects Ohio consumers from suppliers who commit unfair, deceptive, or unconscionable acts or practices before, during, or after a consumer transaction. In prohibiting such acts or practices, the CSPA necessarily contemplates the admissibility of a supplier’s oral representations before and during a consumer transaction, including instances where those representations are inconsistent with the terms of a subsequent written contract. In fact, in many cases, the oral representations or promises made by the supplier actually may form the sole basis of the CSPA violation, apart from any contract at all. For this reason, imposition of the parol evidence rule to claims under the CSPA would make the Act itself virtually unenforceable. Moreover, imposition of the parol evidence rule to a CSPA claim is inconsistent with the language and purpose of the CSPA, the circumstances under which it was enacted, the statute’s liberal construction, and the statutory nature of the CSPA.

Imposing the parol evidence rule on to CSPA claims would emasculate the CSPA, extinguishing major portions of the CSPA and its substantive rules, and render the statute nearly meaningless. It would effectively amend the CSPA statute to declare that any consumer transaction that culminated in a written agreement would no longer be subject to the CSPA. The legislature has not done such, in spite of several amendments to the CSPA since its inception 37 years ago.

### **STATEMENT OF FACTS & STATEMENT OF THE CASE**

The *Amicus Curiae* defer to and adopt herein the Statement of Facts and Statement of Case as set forth in the Appellee Reynold Williams' Merit Brief.

### **ARGUMENT**

#### **Proposition of Law:**

***The parol evidence rule does not apply to CSPA claims, because the evidence is offered not to contradict the contract, but instead to prove an unfair, deceptive, or unconscionable act***

**A. Application of the parol evidence rule to CSPA claims is inconsistent with the purpose of the CSPA, the circumstances under which the CSPA was enacted, and the statute's liberal construction.**

Application of the parol evidence rule to a CSPA claim is inconsistent with the purpose of the CSPA, the circumstances under which the CSPA was enacted, and the statute's requirement of liberal construction.

As this Court has recognized, the CSPA "is a remedial law which is designed to compensate for traditional consumer remedies and so must be liberally construed" in favor of the consumer. *Einhorn v. Beau Townsend Ford, Inc.* (1990), 48 Ohio St.3d 27,

29 (citing Roberts & Martz, Consumerism Comes of Age: Treble Damages and Attorney Fees in Consumer Transactions – the Ohio Consumer Sales Practices Act (1981), 42 Ohio St. L.J. 927, 928-929) Because the CSPA contains traditional consumer remedies, RC 1.11 requires courts to construe the CSPA in favor of consumers. *Harrel v. Talley*, 2007 Ohio 3784, P22. To construe a statute liberally is to give generously all that the statute authorizes and to adopt the most comprehensive meaning of the statutory terms in order to accomplish the aims of the statute, to advance its purpose, and to resolve all reasonable doubts in favor of the party the statute was intended to protect. *Bailey v. Republic Engineered Steels, Inc.* (2001), 91 Ohio St.3d 38, 40. As the CSPA was intended to protect consumers, all reasonable doubts should be resolved in the consumer's favor.

The purpose of the CSPA is to protect consumers from unfair or deceptive or unconscionable sales practices, *Charvat v. Farmers Insurance Columbus, Inc.* (2008), 178 Ohio App.3d 118, at ¶20 (citing *Roelle v. Orkin Exterminating Co.*, Franklin App. No. 00AP-14, 2000 WL 1664865), to encourage fair consumer sales practices, OAC 109:4-3-01, and to make its enforcement feasible for consumers who might not otherwise have the funds to pursue violations of the Act in court. *Einhorn v. Ford Motor Co.* (1990), 48 Ohio St.3d 27, 29, 548 N.E.2d 933; *Parker v. I&F Insulation Co., Inc.* (2000), 89 Ohio St.3d 261, 268; *Whitaker v M.T. Automotive, Inc.* (2006), 111 Ohio St.3d 177, 2006-Ohio-5481.

In so doing, and as pointed out by the National Conference of Commissioners on Uniform State Laws in its Prefatory Note, “uniform legislation concerning consumer sales practices is desirable from the standpoint of both consumers and businessmen.”

In fact, the CSPA protects honest businesses from unfair competition which is economically disadvantageous to them in their marketplace, just as much as it protects consumers from falling victim to the CSPA's prohibited acts.

In *Thomas v. Sun Furniture & Appliance Co.* (1978), 61 Ohio App.2d 78, the First District Court of Appeals analyzed the staff report of the Ohio Legislative Service Commission, which the General Assembly apparently had before it when the CSPA was enacted, and summarized the reason for enactment of the CSPA as follows: "to give the consumer protection from a supplier's deceptions which he lacked under the common law requirement....." Also instructive on the issue is the Uniform Consumer Sales Practices Act – the act which the Ohio CSPA is modeled after. The stated purpose of that consumer protection statute is to promote the following policies:

(2) to protect consumers from suppliers who commit deceptive and unconscionable sales practices; (3) to encourage the development of fair consumer sales practices...*Thomas v. Sun Furniture & Appliance Co.* (1978), 61 Ohio App.2d 78, 81 (citing 7A Uniform Laws Anno. 3, Uniform Consumer Sales Practices Act, Section 1 (1978)).

Clearly, the General Assembly's purpose when it enacted the CSPA was both to provide broad remedies for consumers like Mr. Williams that were unavailable at common law, and to encourage compliance on the part of suppliers who might otherwise be tempted to violate the CSPA. That stated purpose can also serve to protect suppliers like Spitzer Autoworld Canton, LLC. **from** the economic disadvantage of the unfair competition caused by suppliers who violate the CSPA.

The imposition of the parol evidence rule to a CSPA cause of action is inconsistent with these purposes because it would allow oral misrepresentations which violate the CSPA, such as those listed at RC 1345.02(B), to be shielded from CSPA's liability merely

by the act of a supplier culminating the transaction with a written agreement.

In many instances, parol evidence may itself form the basis of a CSPA violation. See RC 1345.02(B)(1)-(B)(10); see also RC 1345.03(B)(6); OAC 109:4-3-16(B)(22). Thus, imposition of the parol evidence rule to CSPA cases would virtually extinguish major portions of the CSPA which the legislature enacted. This would not serve to protect Ohio consumers from deceptive or unconscionable acts. Nor would it encourage suppliers to engage in fair consumer sales practices. Indeed, it would encourage unfair competition and multiply the financial difficulties already faced by honest merchants. Imposing the parol evidence rule on CSPA cases would instead place consumers and suppliers back where they were before the CSPA was enacted in 1972. The CSPA statute, which was enacted for the better protection of both parties, would become meaningless.

Therefore, the *Amicus Curiae* urge this Court to uphold the purpose of the CSPA and affirm the judgment below.

**B. The text of the CSPA itself assumes the admissibility of a supplier's oral representations at all stages of a consumer transaction.**

The CSPA and the rules promulgated under it clearly impose liability for violative statements and promises that otherwise would be barred by the parol evidence rule.

It is a violation of the CSPA for a supplier to commit an unfair, deceptive, or unconscionable act or practice before, during, or after a consumer transaction. RC 1345.02(A); RC 1345.03(A). In prohibiting acts or practices committed before, during, or after a consumer transaction, the CSPA assumes the admissibility of a supplier's oral representations at all stages of a consumer transaction, including instances where those

representations are inconsistent with the subsequent language of a written contract. In fact, in many cases, the oral representation or promise made by the supplier actually may form the basis of the CSPA violation.

For instance, RC 1345.02(B), without limiting the scope of RC 1345.02(A), provides a list of ten representations that are considered to be deceptive when represented by a supplier in a consumer transaction. The list includes such things as representing “that the subject of a consumer transaction is new, or unused, if it is not” found at RC 1345.02(B)(3), or “that replacement or repair is needed, if it is not” found at RC 1345.02(B)(7). Proof of those violations can only be made by introduction of the statement itself, which is something that imposing the parol evidence rule would forbid.

Similarly, pursuant to RC 1345.03(B)(6), it is unconscionable for a supplier to knowingly make a “misleading statement of opinion” that a consumer is likely to rely on to his or her detriment. Proof of a misleading statement can only be made by introduction of the statement itself, which is something that imposing the parol evidence rule would forbid.

Moreover, at RC 1345.05(B)(2) the statute authorizes the adoption of substantive rules by the Ohio Attorney General “defining with reasonable specificity acts or practices” that violate the CSPA. A number of these rules have been adopted after public and industry participation in the rule-making process. Imposition of the parol evidence rule would nullify many, if not all, of those substantive rules.

For instance, pursuant to OAC 109:4-3-16(b)(22), it is a deceptive and unfair act for a supplier, in connection with the sale of a motor vehicle, to “[f]ail to integrate into any written sales contract, all material statements, representations or promises, oral or

written, made prior to obtaining the consumer's signature on the written contract with the dealer." Proof of a violation of this administrative rule can only be made by introduction of the statement itself, which is something that imposing the parol evidence rule would forbid.

Therefore, imposition of the parol evidence rule to CSPA cases would render major portions of the CSPA and its substantive rules meaningless. And, to render the CSPA meaningless is contrary to the "basic presumption in statutory construction that the General Assembly is not presumed to do a vain or useless thing, and that when language is inserted in a statute it is intended to accomplish some definite purpose." *State v Weaver* (4<sup>th</sup> CA, 1993), 86 Ohio App.3d 427, 529, citing *State ex rel. Cleveland Elec. Illuminating Co. v. Euclid*, (1959), 169 Ohio St. 476, 479. Certainly when the General Assembly drafted RC 1345.02(B)(1)-(B)(10) and RC 1345.03(B)(6), it intended for parol evidence to support these CSPA violations.

The legislature has not seen fit to amend the statute to impose the parol evidence rule on claims brought under the CSPA, although it has repeatedly amended the statute for other reasons. It would not be prudent for this Court to take it upon itself to do what the legislature has itself chosen not to do.

Therefore, the *Amicus Curiae* urge this Court not to return consumers back to where they were at common law, but instead to follow the CSPA as written and enacted by the General Assembly, and affirm the judgment below.

**C. The parol evidence rule is irrelevant and inapplicable to statutory claims under the CSPA, because the evidence is offered not to contradict the contract, but instead to prove an unfair, deceptive, or**

**unconscionable act.**

In its creation and adoption of the Uniform CSPA, the National Conference of Commissioners on Uniform State Laws used language which could only be implemented by not imposing the constraints of the parol evidence rule on actions brought under the Uniform CSPA. In its enactment of Ohio's CSPA, the Ohio Legislature did the same. The parol evidence rule is not relevant to a CSPA cause of action because the CSPA, like the Uniform CSPA, is not rooted in contract law.

Moreover, the parol evidence rule does not apply to statutory claims under the CSPA because, among other reasons, the aggrieved consumer may not even be attempting to enforce the oral representations or promises made at all. As an example, the aggrieved consumer may instead be claiming that the supplier's representations were unfair, deceptive, or unconscionable. Those violative representations, for example, stand apart from any subsequent written agreement and yet may not arise to the more extreme level of common law fraud.

As the Second District Court of Appeals explained, in *Wall v. Planet Ford, Inc.* (2005), 159 Ohio App.3d 840, the consumer in a CSPA action is not attempting to enforce the oral representations made by the supplier, but is instead claiming that the oral representations made by the supplier were unfair, deceptive, or unconscionable acts or practices made in connection with a consumer transaction. *Wall*, 159 Ohio App.3d at 848 (quoting *Doody v. Worthington*, Franklin Cty. M.C. No. M 9011CVI-37581, 1991 WL 757571, at \*3; citing National Consumer Law Center, *Unfair and Deceptive Acts and Practices* (2 Ed. 1988), Sections 4.2.15 and 5.2.4.) For that reason, the parol evidence rule is irrelevant and inapplicable to a claim under the CSPA. *Wall*, 159 Ohio App.3d at

848. It may well be relevant to a contract claim, but that is not a CSPA claim.

As in *Wall v. Planet Ford, Inc.*, Mr. Williams offered the oral representations made by Spitzer Autoworld Canton, LLC to prove an unfair and deceptive act in connection with a consumer transaction – the sale of the motor vehicle to him. Thus, for the same reasons that the parol evidence rule was irrelevant and inapplicable to the CSPA claim in *Wall v. Planet Ford, Inc.*, it is inapplicable to this CSPA claim.

Therefore, the *Amicus Curiae* urge this Court to adopt the well reasoned opinion in *Wall v. Planet Ford, Inc.*, as the Fifth District Court of Appeals did, and to affirm the judgment below.

**D. Other states allow evidence of oral representations to prove violation of their consumer protection laws, where the parol evidence rule would normally bar the evidence.**

Ohio is not alone in allowing an exception to the parol evidence rule for consumer protection claims. In fact, Kentucky, California, Texas, North Carolina, Arizona, Tennessee, and Florida all allow evidence of oral representations to prove violation of their consumer protection laws. *Craig & Bishop v. Piles*, 2005 WL 3078860, \*2 (Ky. App. 2005), aff'd 247 S.W.3d 897 (Ky. S.Ct. 2008) (holding that parol evidence was admissible for purposes of the Kentucky Consumer Protection Act claim); *Wang v. Massey Chevrolet* (2002), 97 Cal.App.4th 856, 118 Cal.Rptr.2d 770 (holding that the parol evidence rule is not a defense to a claim for violation of the California Consumers Legal Remedies Act); *Downs v. Seaton* (Texas App. 1993), 864 S.W.2d 553, 555 (holding that oral representations are admissible and can serve as the basis for a claim for violation of the Texas Deceptive Trade Practices Act); *Torrence v. AS & L*

*Motors, LTD.* (N.C. App. 1995), 119 N.C.App. 552, 554-555, 459 S.E.2d 67 (holding that parol evidence is admissible to prove unfair or deceptive practices in violation of the state's consumer protection law); *Aguirre v. Brodeur*, 2007 WL 5462123, ¶135 (Ariz. App. Div. 1) (holding that parol evidence was admissible as the basis of the consumer's claim for violation of the Arizona Consumer Fraud Act); *Lipford v. First Family Financial Services, Inc.*, 2004 WL 948645, \*2 (Tenn. Ct. App.) (holding that the parol evidence rule did not bar the admission of oral evidence in support of the consumer's Tennessee Consumer Protection Act claim); *Richards v. Luxury Imports of Palm Beach, Inc.*, 877 So.2d 944 (Fla. Dist. Ct. App. 2004) (considering parol evidence in support of the consumer's Florida Deceptive and Unfair Trade Practices Act claim).

Moreover, the reasons for not applying the parol evidence rule in other states parallel the reasoning of the Second District Court of Appeals in *Wall v. Planet Ford, Inc.* For example, in North Carolina, parol evidence is admissible where offered in support of a consumer law claim, because it was "not offered to contradict a contract, but rather to prove an unfair or deceptive practice." *Torrence v. AS & L Motors, LTD.* (N.C. App. 1995), 119 N.C.App. 552, 555, 459 S.E.2d 67.

When an oral statement is offered to prove an unfair and deceptive act occurred in violation of the CSPA, it is not used to contradict a contract. The reasons for admitting such parol evidence in other states are the same as they are here in Ohio.

Therefore, the *Amicus Curiae* urge this Court to consider the well reasoned decisions in Kentucky, California, Texas, North Carolina, Arizona, Tennessee, and Florida, and to affirm the judgment below.

## CONCLUSION

In spite of the subsequent amendments to the CSPA, the legislature has not amended the statute to allow the well-known limitations of the parol evidence rule to be imposed in a CSPA claim.

Imposing the parol evidence rule, where the legislature has chosen not to, would effectively rewrite the CSPA and render much of the statute and its substantive rules meaningless. The *Amicus Curiae* submit that neither the Ohio legislature nor the National Conference of Commissioners on Uniform State Laws intended such consequences.

A reversal of the judgment below is not called for or supported by the plain language of the CSPA. Doing so would injure honest businesses who strive daily to comply with the law and daily to compete with those businesses who decide to do otherwise, placing them at severe economic disadvantage in the marketplace. Likewise, it would strip away long-standing marketplace protections the Ohio legislature thoughtfully and carefully put in place nearly 40 decades ago.

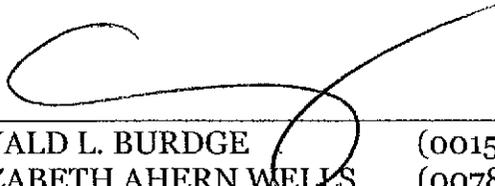
The need for this fair and balanced statute is as apparent today as it was in 1922 when this Court said,

There is entirely too much disregard of law and truth in the business, social and political world of today. \* \* \* It is time to hold men to their primary engagements to tell the truth and observe the law of common honesty and fair dealing. \* \* \* *Meyer v. Packard Cleveland Motor Co.* (1922), 106 Ohio St. 328, 338-339.

Common honesty and fair dealing will be furthered by a holding that the parol evidence rule has no application to a claim under the CSPA.

Therefore, the *Amicus Curiae* urge this Court to **affirm** the judgment below.

Respectfully submitted,



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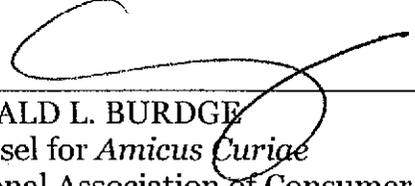
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And Ohio Association for Justice

And Stark County Association for Justice

#### CERTIFICATION

I hereby certify that a true copy of the foregoing was served upon **G. Ian Crawford**, Counsel for Appellee Reynold Williams, Jr., at 116 Cleveland Avenue NW, Suite 800, Canton, Ohio 44702, and upon **Anthony B. Giardini**, Counsel for Appellant Spitzer Autoworld Canton, LLC, at 520 Broadway, Second Floor, Lorain, Ohio 44052; all by ordinary mail on March 5, 2009.



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