

ORIGINAL

IN THE SUPREME COURT OF OHIO

JEFFREY FELIX, *et al.*,

Plaintiffs-Appellees,

v.

GANLEY CHEVROLET, INC., *et al.*

Defendants-Appellants.

) Case No. 13-1746

)

) On appeal from the Cuyahoga County Court of

) Court of Appeals Eighth Appellate District

) Case No. CA 12 098985

)

)

)

)

**MEMORANDUM IN SUPPORT OF JURISDICTION OF
DEFENDANTS-APPELLANTS
GANLEY CHEVROLET, INC. AND GANLEY MANAGEMENT COMPANY**

Joseph A. Castrodale (0018494)

Counsel of Record

David D. Yeagley (0042433)

Ulmer & Berne LLP

Skylight Office Tower

1660 West 2nd Street, Suite 1100

Cleveland, OH 44113

Telephone: (216) 583-7000

Fax: (216) 583-7001

jcastrsdale@ulmer.com

dyeagley@ulmer.com

A. Steven Dever (0024982)

A. Steven Dever Co., LPA

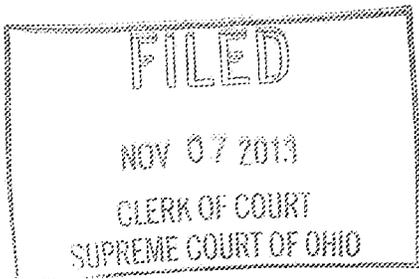
13363 Madison Avenue

Lakewood, Ohio 44107

(216) 228-1166

astevendevery@aol.com

Counsel for Defendants-Appellants



Lewis Zipkin
ZIPKIN WHITING CO., L.P.A.
The Zipkin Whiting Building
3637 South Green Road
Beachwood, Ohio 44122

Mark Schlachet
3515 Severn Road
Cleveland Heights, Ohio 44118

Attorneys for the Plaintiffs-Appellees

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THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST

The trial court certified a class composed of all customers of twenty-five Ganley-related automobile dealerships whose automobile purchase contracts included a certain arbitration clause, based on the theory that the inclusion of that clause in the contracts was a deceptive act in violation of the Ohio Consumers Sales Practices Act, Ohio R.C. 1345.01, *et seq.* (CSPA). The trial court further entered a partial judgment, arbitrarily awarding “discretionary damages” of \$200 for every transaction. There was no evidence before the trial court, however, that any of the customers other than the named plaintiff even had a dispute relating to their purchase that might have implicated the arbitration clause. This case raises the crucial public and general interest question of whether a class can be certified under Ohio R. Civ. P. 23 and R.C. 1345.09(B) when it includes individuals who were not even affected by – and did not sustain actual harm or damages arising out of – the allegedly deceptive act.

In a 2-1 decision, the Eighth District Court of Appeals affirmed the trial court’s order certifying a class that overwhelmingly is composed of customers unaffected by the mere inclusion of the arbitration clause because the majority erroneously determined that the question of whether R.C. 1345.09(B) “limits class actions to actual damages” was “outside the scope of [appellate] review” under Rule 23. The 16-page dissenting opinion points out that “the CSPA’s damages limitation impacts not only the damages that may ultimately be recovered by a properly certified class, but whether a putative class may be properly certified as a Civ.R. 23(B)(3) CSPA class in the first instance.”

This Court recently held that a court “must undertake a rigorous analysis ... for the purpose of determining whether the plaintiff has satisfied the prerequisites of Civ.R. 23” and further explained that “a class is defined too broadly” if it includes individuals “who for some reason could not have been harmed.” *Stammco, L.L.C. v. United Tel. Co. of Ohio*, 136 Ohio

St.3d 231, 2013-Ohio-3019, 994 N.E.2d 408, Syllabus, ¶¶53; *see also Cullen v. State Farm Mut. Auto. Ins. Co.*, Slip. Op. No. 2013-Ohio-4733, ¶¶15-18 (Nov. 5, 2013). The majority Eighth District decision not only severely truncates the “rigorous analysis” under Rule 23, it deems as “outside the scope” of Rule 23 a requirement – the identifiability of a class of individuals who can show actual harm – that *Stammco* holds is a Rule 23 prerequisite. Instead of denying class certification when the class includes persons “who could not have been harmed,” the decision below relegates the Rule 23 prerequisite to a post-certification assessment of what, if any, damages could be awarded. As a result, an improper class would be certified, notice sent, and the merits litigated (under the often crushing weight of a class action proceeding), only to then address the question whether the class claim should have proceeded in the first place.

Moreover, at least two appellate courts have held that R.C. 1345.09(B) requires “actual damages” in a CSPA class action. The decision below for the first time holds that the question of actual harm or damages to class members in a putative class action is outside the scope of Rule 23, disregarding R.C. 1345.09(B)’s actual damages requirement in a CSPA class action.

The decision below also directly implicates R.C. 1345.09(B)’s requirement of “prior notice” in a CSPA class action. In a 2006 decision, the Court of Appeals held that the arbitration provision was *contractually* unenforceable as to the Felixes, but the class includes customers whose purchases predate that ruling by several years. Although there was no prior notice that including this particular (or any other) arbitration clause could run afoul of the CSPA, the majority ruled that prior notice requirement was satisfied by Ohio Administrative Code (OAC) 109:4-3-16(B)(22). The decision below significantly expands Ohio law, both by holding that a generic OAC provision gives the requisite “prior notice” under R.C. 1345.09(B) and also

by imposing under the CSPA a virtually unlimited duty of disclosure between contracting parties.

This appeal raises the important question of whether a class action CSPA claim can be brought for merely including an arbitration clause that is subsequently determined under contract law to be unenforceable. Here, the narrow ruling that the clause was unenforceable as to the Felixes was transformed into a determination of the clause's overall, classwide "illegality" without any evidence of individualized "procedural unconscionability" as to any other customer. Up to this point, defective contract provisions have been, upon proof, contractually unenforceable and severed, but the decision significantly expands Ohio law by turning a contractual *defense* to enforcement of an arbitration clause into a class action *CSPA claim* for merely including that clause.

This case presents a question of public and great general interest because the trial court entered partial judgment in favor of the class *before* the class action notice was sent to the members of the class, which violates Civ. R. 23(C)(2) and due process.

The certification of a Civ. R. 23(B)(2) and (B)(3) class, where the trial court simultaneously entered partial judgment awarding millions of dollars of so-called "discretionary damages" but without actual harm or corresponding actual damages, is contrary to Rule 23, the class action requirements of the CSPA, and this Court's decisions in *Stammco* and *Cullen*.

STATEMENT OF THE CASE AND FACTS

In March 2001, Plaintiffs-Appellees Jeffrey and Stacy Felix drove a new Chevrolet Blazer off the lot of Defendant-Appellant Ganley Chevrolet, Inc. In connection with their purchase, Plaintiffs signed a Purchase Agreement that contained a separately signed provision that purchase-related disputes would be arbitrated. A dispute subsequently arose

regarding the interest rate applicable to their purchase. The Felixes never returned the vehicle and have never paid a penny toward its purchase.

In June 2001, Plaintiffs sued Ganley Chevrolet in Case No. CV-01-442143 over the interest rate dispute. In November 2001, Plaintiffs sought leave to file a second amended complaint (in Case No. CV-01-442143), further alleging that inclusion of the arbitration clause was a violation of the CSPA. Plaintiffs thereafter sought leave to file a third amended complaint, which was granted in December 2001.

Around the same time, Plaintiffs filed a second lawsuit against Ganley Chevrolet (Case No. CV-01-454238), a declaratory judgment action alleging a violation of the CSPA for including the arbitration provision. On May 23, 2003, the complaints in both Case Nos. CV-01-442143 and CV-01-454238 were amended (the fourth and second amended complaints, respectively) to add class action allegations with respect to the inclusion of an arbitration clause in the contracts. Defendant-Appellant Ganley Management Company was also added as a party defendant in those fourth and second amended complaints filed nearly two years after the lawsuit was commenced.¹

Defendants moved to stay proceedings pending arbitration in both cases, the trial court consolidated the cases, and there was a hearing on the motion over the course of three days in 2004. The trial court also heard argument on the issue of class certification, at which counsel for Plaintiffs conceded that “there is no common measure of damages.” Tr. at 12.

On August 23, 2005, the trial court denied the motion to stay pending arbitration. Defendants appealed, and in August 2006 the Eighth District Court of Appeals upheld the denial of the motion to stay on the ground that the arbitration provision, strictly as to the Felixes’ own claims, was both “substantively unconscionable” and “procedurally unconscionable.” *Felix v.*

¹ Ganley Management Company is a management company that did not enter into any arbitration agreements, sell any automobiles, or have any dealings with customers.

Ganley Chevrolet, Inc., 8th Dist. Nos. 86990, 86991, 2006-Ohio-4500, *review denied*, 112 Ohio St.3d 1470, 2007-Ohio 388. The Court of Appeals did not find any violation of the CSPA; to the contrary, the Court noted that “the essential issue before us is whether the dispute between the parties is governed by a valid, enforceable agreement to arbitrate.” *Id.* at ¶13. As noted, this Court declined to review the arbitration decision.

Upon remand, the parties submitted additional Rule 23 briefing in 2007 and 2009. Several years later, on September 10, 2012, the trial court issued a “Proposed Order of Class Certification and For Partial Judgment on the Merits” and identical judgment entries in Case No. CV-01-442143 and Case No. CV-01-454238 (collectively, the “Order”). (The trial court’s Order is attached as Exhibit A.)²

In the Order, the trial court certified a class consisting of all customers of every Ganley-affiliated dealership, from “commencement through the present date,” who signed a purchase agreement containing an arbitration clause that is “substantially similar” to the one the Felixes signed. Order, p. 3. The trial court also entered judgment against Defendants on the CSPA claim, concluding that the “unlawful conduct” was “the use of the arbitration clause.” Order, p. 4. The trial court imposed damages in the court’s “discretion” of \$200 per transaction over the entire class period, reasoning that the Court of Appeals in the 2006 decision determined the “illegality” of the arbitration clause. Order, pp. 3, 7, 9. Although customers of 25 dealerships are included in the class, the actual dispute is between one customer and one dealership.³

² The reference to “Proposed” apparently was a carryover from a proposed order that Plaintiffs had prepared and submitted to the trial court several years earlier.

³ It remains unclear when the class period begins, since the class action allegations were not asserted until May 2003, not in 2001 when the lawsuit was commenced. Likewise, it remains unclear when the class period ends based on “substantially similar” arbitration clauses, a determination that the trial court left to a later, post-certification process. *See* Opinion at ¶56 (dissent).

Defendants filed a timely notice of appeal of the trial court's class certification Order. On August 15, 2013, the Court of Appeals issued a Judgment and Journal Entry and Opinion ("Opinion") that affirmed, in a 2-1 decision, the trial court's Order. (A copy of the Opinion is attached as Exhibit B.) In the Opinion, the majority found, among other things, that the Rule 23 "identifiable class" prerequisite was met because "it would be administratively feasible" to determine, for each customer, whether the contract included an arbitration clause. Opinion at ¶¶18-19. Contrary to the rule in *Stammco*, the majority did not consider whether, for any such customer, the mere inclusion of the arbitration clause caused any actual harm or damage.

The Opinion includes a 16-page dissent, which points out that customers who had no underlying dispute sustained no actual damages arising from the inclusion of the arbitration clause. The dissent also finds, with respect to R.C. 1345.09(B)'s prior notice requirement, that there was no prior notice that the "inclusion of the subject arbitration provision ... was an unfair or deceptive act under the CSPA." The dissent noted that the Order improperly granted judgment and thus "is proceeding on an improper procedural course" under Civ.R. 23(C)(2).

Defendants timely sought reconsideration and en banc review of the Opinion pursuant to Ohio R. App. P. 26(A)(1) and (2). Reconsideration was denied on September 13, 2013 (*see* Entry attached as Exhibit C), and en banc review was denied on September 24, 2013 (*see* Entry attached as Exhibit D).

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1

A class action cannot be maintained on behalf of a putative class that includes individuals who did not sustain actual harm or damage as a result of the challenged conduct, which is a required part of the rigorous analysis under Ohio R. Civ. P. 23.

The certified class includes all customers of any Ganley-related dealership whose contracts included the subject arbitration clause, but such a class clearly and improperly includes customers that never even had a dispute that implicated the clause. In *Lee v. Am. Express Travel Related Services*, 2007 WL 4287557 (N.D. Cal. 2007), *aff'd*, 348 Fed. App'x 205 (9th Cir. 2009), the court rejected the notion that customers were damaged by the mere inclusion of a disputed arbitration clause, noted that its terms “have not been implicated in any actual dispute between the parties,” and thus held that “a court may not presume damages based on the mere insertion of an unconscionable clause in a contract.” *Id.* at *4-5. In this case, the trial court created a class action dispute based on a dispute resolution clause that (except for the named plaintiff) was not in dispute.

The existence of an identifiable or ascertainable class of people who were actually harmed by the allegedly wrongful conduct is a long-established Rule 23 prerequisite. This Court, in the recent decision in *Stammco*, held:

[i]f *** a class is defined so broadly as to include a great number of **members who for some reason could not have been harmed** by the defendant’s allegedly unlawful conduct, **the class is defined too broadly to permit certification.**

Stammco, *supra* at ¶53 (emphasis added). In other words, while this Court held in *Stammco* that the question of actual harm must be considered under Rule 23, the Court of Appeals held that it is outside of Rule 23. The decision below fundamentally changes the Rule 23 framework, with the implication that overbroad classes, such as this class, would be certified, notice sent, and the merits heard (as a class action), only to later confront the fact that the class includes individuals who “could not have been harmed” and thus that the class should not have proceeded in the first place. Furthermore, if the class were to be defined around those customers (if any) who might have actually had a dispute, identifying them would, as in *Stammco*, entail “individualized determinations ... that make certification of a class inappropriate.” *Id.* at ¶58.

Neither the majority nor the en banc court addressed the principles set forth in Paragraphs 53 or 58 of *Stammco*. See Exhibits B and D. In denying en banc review, the Eighth District concluded that “[t]he question whether the class should be limited with respect to the damages claim may be addressed in future proceedings.” However, that conclusion begs the question of the scope of a “rigorous analysis” under Civ.R. 23 where the class includes putative members who have no colorable claim that they were, in the words of *Stammco*, “harmed by the defendant’s allegedly unlawful conduct.” Thus, if “questions ... with respect to the damages claim” are for future proceedings,” does that mean that inquiry into actual harm and damage must (or can) bypass Rule 23 and await such future proceedings as a class action, or is a court instead required under Rule 23 to address *on class certification* the existence of actual harm and damage of those that would be in the class? This Court should address what is a “rigorous analysis” under Rule 23 of the identifiable class prerequisite, *i.e.*, whether considerations that touch on the “damages claim” – including whether those in the class even have a claim – are broadly relegated to “future proceedings,” because the decision below otherwise sets out a roadmap for certifying no injury class actions in the future. In *Cullen*, this Court held that courts should not defer to future proceedings issues that impact Rule 23. *Cullen, supra* at ¶¶33-34.⁴

The issue of whether actual harm was suffered by the individuals included within a class was not deferred until later in *Hoang v. E-Trade Group, Inc.*, 8th Dist. No. 81425, 151 Ohio App. 3d 363, 2003-Ohio-301. In *Hoang*, the Eighth District **denied class certification** on the ground that the class, which included all customers of an electronic brokerage that experienced a system outage, was overbroad because many of them were not harmed by the system outage. The *Hoang* court reasoned that a class must be composed of individuals who, on

⁴ The “rigorous analysis” required under Rule 23 extends to “all of the requirements of the rule.” *Cullen, supra* at Syllabus at ¶1. One of those requirements is an “identifiable class.” *Id.* at ¶12, citing *Stammco*.

a class-wide basis, can show “**proof of actual injury caused by the alleged wrongdoing.**” *Id.* at ¶¶ 19-21 (emphasis added). As the *Hoang* Court held, proof of injury (or “fact of damages”) is a necessary predicate to class certification because it goes to liability and not to the “amount of damages.” *Id.* at ¶¶ 20-21. Just as in *Hoang*, customers of the Ganley dealerships who had no underlying dispute were not harmed by the mere presence or inclusion of the arbitration clause. Contrary to Plaintiffs’ argument, the CSPA claim did not “accrue” upon the mere inclusion of the clause; actual harm is a necessary element of any claim.

Article IV, Section 5(B) of the Ohio Constitution empowers this Court to create rules of procedure; however, such procedural rules “shall not abridge, enlarge, or modify any substantive right.” A class action seeking an award of damages that includes, as here, individuals who were not actually harmed by the challenged conduct abridges a defendant’s substantive rights, including due process rights, because “actual injury cannot be presumed.” *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 232 (2d Cir. 2008) (quoting *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 191-92 (3d Cir. 2001)).⁵

Proposition of Law No. 2

In a class action brought under the Ohio Consumer Sales Practices Act, R.C. 1345.09(B) requires the consumers to have sustained actual damages as a result of the challenged conduct.

In this case, the Court of Appeals was presented with the question of whether the class improperly includes “individuals who have no claim and who have sustained no actual damages as a result of Ganley’s inclusion of the arbitration provision in its sales agreements.”

⁵ Although the majority affirmed certification under Civ.R. 23(B)(2) and (B)(3), there is no classwide dispute, no actual harm, and hence no identifiable class under either (B)(2) or (B)(3). See Proposition of Law No. 1, *supra*. With respect to the injunctive relief class, the Court found that “[t]he use of the arbitration clause constitutes a threat to the class as a whole” (Opinion at ¶32), but that rationale did not consider the absence of actual harm, that the arbitration clause was discontinued in 2006, or that a subsequent version of the clause was upheld in *Wallace v. The Ganley Auto Group*, 8th Dist. No. 95081, 2011-Ohio-2909.

See Opinion at ¶33. At least two appellate courts have held that, in a CSPA class action brought under Civ.R. 23(B)(3), R.C. 1345.09(B) requires the plaintiffs to have sustained actual damages as a result of the challenged conduct. In *Searles v. Germain Ford of Columbus, LLC*, 10th Dist. No. 08AP-728, 2009-Ohio-1323, ¶22, the Tenth District held that “proof of **actual damages is required before certification** of a R.C. 1345.09 class action is proper.” (Emphasis added.) In *Washington v. Spitzer Mgmt., Inc.*, 8th Dist. No. 81612, 2003-Ohio-1735, ¶33, the Eighth District held that R.C. 1345.09(B) “limits damages available in a [CSPA] class action to actual damages.” See also Opinion at ¶72 (dissent) (R.C. 1345.09(B) impacts “whether a putative class may be properly certified as a Civ.R. 23(B)(3) CSPA class in the first instance”).⁶

The requirement of “actual damages” under R.C. 1345.09(B) is also derived from R.C. 1345.09(B)’s purposeful exclusion of “statutory damages” in a class action. That distinction is especially important in this case because the trial court’s imposition of classwide “discretionary damages” of \$200 per transaction is, not coincidentally, the *same amount* as “statutory damages” under the CSPA, but **“statutory damages” are not permitted in a CSPA class action, nor does the law recognize “discretionary damages” arbitrarily determined – without any evidence – by a court.** A trial court cannot avoid the express statutory prohibition against presuming “statutory damages” by instead calling the award “discretionary damages.” Here, the vast majority of customers included within the class never had a dispute in the first place and therefore did not sustain any actual harm or damage as a result of the inclusion of an uninvoked arbitration clause in their contracts. See *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 185 L.Ed.2d 515 (2013) (holding that class certification requires classwide damages resulting from the challenged conduct).

⁶ Plaintiffs have argued that a prior version of R.C. 1345.09(B) applies, which required “actual damages” and not “actual economic damages.” Either way, the question is whether R.C. 1345.09(B) sets forth an “actual damages” requirement.

The bottom line under Propositions of Law Nos. 1 and 2 is that the class certification order – and the intertwined judgment that arbitrarily creates millions of dollars of potential liability without any corresponding actual damages – cannot stand without eviscerating critical aspects of Rule 23 and R.C. 1345.09(B) that ensure fairness and due process.

Proposition of Law No. 3

In a class action brought under the Ohio Consumer Sales Practices Act, R.C. 1345.09(B) requires prior notice that the challenged conduct was specifically prohibited by the Act.

The Court of Appeals made new law that contradicts this Court’s pronouncements as to the “prior notice” requirement under R.C. 1345.09(B). *See Marrone v. Philip Morris USA, Inc.*, 110 Ohio St. 3d 5, 2006-Ohio-2869, 850 N.E.2d 31, ¶24 (R.C. 1345.09(B) requires notice that the “the **specific conduct** at issue violated the act”) (emphasis added); *Volbers-Klarich v. Middletown Mgmt., Inc.*, 125 Ohio St.3d 494, 502, 2010-Ohio-2057, 929 N.E.2d 434 (“[a] general rule is not sufficient [...] notice of the prohibition against a specific act or practice”). There is no OAC rule or case law authority⁷ that finds that the use of this (or any other) arbitration clause is or could be a deceptive practice under the CSPA.

The majority reasoned that the general provisions of OAC 109:4-3-16(B)(22) provided prior notice that the specific conduct at issue here violated the CSPA. Opinion at ¶40. OAC 109:4-3-16(B)(22) provides that it is deceptive to

[f]ail to integrate into any written sales contract, **all material statements, representations or promises [...] made prior to obtaining the consumer’s signature** on the written contract with the dealer. (Emphasis added).

The majority is simply wrong; the OAC provision in no way addresses the specific conduct at issue. The Opinion thus sweeps into the class thousands of customers whose contracts predate

⁷ While the majority cited case law decisions, the dissent points out that those cases had nothing to do with using an arbitration clause.

by several years both the 2006 decision that *contractually* invalidated the Felixes' arbitration clause (which the dealerships discontinued), and the trial court's 2012 Order, which was the *first notice* that using the arbitration clause could be a violation of the CSPA. Consequently, the issue of first impression under R.C. 1345.09(B) is whether OAC 109:4-3-16(B)(22) provides notice that the "specific conduct" (i.e., using the challenged arbitration clause) violates the CSPA, and thus whether certification of a class going back to 1999 or 2001 was legally improper.

Lastly, the dissent points out that OAC 109:4-3-16(B)(22) applies to representations that were "made," whereas the Plaintiffs' claim was that "no part of the arbitration clause was explained." *See* Opinion at ¶59 (dissent). The majority thus applied OAC 109:4-3-16(B)(22) far beyond its plain language, to require under the CSPA disclosure of an unlimited universe of all later-determined "material information." *See* Opinion at 42. The majority also significantly expands Ohio law by imposing an affirmative duty of disclosure among contracting parties. *See Blon v. Banc One Akron, N.A.*, 35 Ohio St.3d 98, 519 N.E.2d 363 (1988) (noting the general common law rule that "neither party has a duty to disclose").⁸

Proposition of Law No. 4

The use of an arbitration clause that is later found to be contractually unenforceable cannot constitute an unfair and deceptive act or practice actionable in a class action brought under the Ohio Consumer Sales Practices Act.

The Court of Appeals improperly certified a class of customers whose contracts included an arbitration clause because the determination of whether an arbitration clause is enforceable, in particular the issue of procedural unconscionability, necessarily entails individualized inquiry, and thus common questions do not predominate. *See* Civ.R. 23(B)(3);

⁸ The majority questioned whether OAC 109:4-3-16(B)(22) "remains a viable basis upon which to base a CSPA violation" in light of *Williams v. Spitzer Autoworld Canton, LLC*, 122 Ohio St.3d 546, 2009-Ohio-3554, 913 N.E.2d 410. *See* Opinion at ¶41, FN 3; *id.* at ¶58 (dissent concurring).

see also R.C. 2711.01(A) (arbitration clause is “valid, irrevocable and enforceable” unless contractual defense is established).

In the 2006 decision, the Court of Appeals did not issue any ruling of “illegality” or find that use of the clause violated the CSPA, but instead found the arbitration clause was contractually unenforceable because, as to the Felixes, it was both procedurally and substantively unconscionable. The Court started with the general rule that an arbitration clause is presumed valid, and the rule that the claimant must prove, as a defense, that the clause is unenforceable based on both substantive unconscionability (the contract terms) and procedural unconscionability (the individualized circumstances surrounding the transaction). *See, e.g., Taylor Bldg. Corp. of America v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12; *see also Felix*, 2006-Ohio-4500 at ¶23 (“individual circumstances” of the Felixes).

Although the Felixes’ own arbitration clause was contractually unenforceable, no evidence of procedural unconscionability has ever been elicited as to any other customer. Even assuming that other customers had a dispute, the decision below bypasses the highly individualized, class-disqualifying evidence of procedural unconscionability that precludes certification of the class, which is the process the Court of Appeals followed as to the Felixes. *See Stammco, supra* at ¶58 (classwide proof required, and individualized determinations preclude certification).

The trial court found “illegality” based on the “use of the arbitration clause.” However, if an arbitration clause were found to be contractually unenforceable as to a specific customer, then under Ohio law the clause would be void and severed from the remainder of the contract. *See ABM Farms, Inc. v. Woods*, 81 Ohio St.3d 498, 501, 1998-Ohio-612, 692 N.E.2d 574 (1998). No court has ever before held that the *earlier* inclusion of an arbitration clause that

is *later* adjudicated to be contractually unenforceable as to one customer is also, retroactively, an affirmative violation of the CSPA as to all other customers with a similar clause.⁹

Indeed, arbitration is favored by both federal and state public policy. *See* R.C. 2711.01, *et seq.*; 9 U.S.C. § 1, *et seq.*; *see also Hayes v. Oakridge Home*, 122 Ohio St.3d. 63, 2009-Ohio-2054, 908 N.E.2d 408. The CSPA, in turn, provides that its provisions “do not apply to an act or practice specifically permitted by or under federal law [...] or under other sections of the Revised Code.” R.C. 1345.12(A). This Court should consider as a matter of first impression the application of R.C. 1345.12(A) because the decision finds that the use of an arbitration clause, which is permitted by 9 U.S.C. § 1 and R.C. 2711.01(A), instead violates the CSPA based on the later-adjudicated contractual unenforceability of that particular clause.

Proposition of Law No. 5

Pursuant to Ohio R. Civ. P. 23(C)(2) and under the Ohio and United States Constitutions, a trial court cannot simultaneously certify a class and grant partial judgment in its favor.

Not only did the trial court certify an overbroad class, the court further proceeded to grant judgment in its favor. While the Court of Appeals ruled that the trial court’s imposition of a partial judgment must await a future appeal, the dissent notes that pursuant to Rule 23(C)(2) the judgment puts the case “on an improper procedural course” directly implicating Rule 23’s procedural due process protections. Opinion at ¶¶73-75 (citations omitted). Indeed, Civ.R. 23(C)(2) prescribes certain mandatory provisions in the class action notice to class members in a Rule 23(B)(3) class, which is required to be sent **before** the trial court adjudicates the merits.

⁹ While the majority cited judicial dicta in *Eagle v. Fred Martin Motor Co.*, 157 Ohio App.3d 150, 2004-Ohio-829, 809 N.E.2d 1161 (9th Dist.), for the proposition that a contractually unenforceable arbitration provision could be a violation of the CSPA (Opinion at ¶13), the *Eagle* court actually held that “the proper mode of analysis, per R.C. 2711.01, is under the **law of contracts**, rather than R.C. 1345 [CSPA] itself.” *See Eagle*, 2004-Ohio-829 at ¶28 (emphasis added). In other words, *Eagle* did not transform an individual contractual *defense* into an affirmative CSPA *claim*, which is what the courts below did in this case.

The decision below thus charts this case on that improper procedural course, compounding the due process issues under both the United States and Ohio Constitutions.

Proposition of Law No. 6

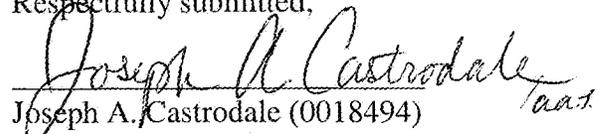
Certification of a class under Ohio R. Civ. P. 23(B)(2) is improper if the primary relief requested is damages.

The majority affirmed certification of a class under both Rule 23(B)(2) and (B)(3). However, not only was certification of any class improper because Plaintiffs could not establish the Rule 23 prerequisites or prior notice under R.C. 1345.09(B) (*see supra*), certification of a Rule 23(B)(2) class was improper for the additional reason that the primary relief requested was monetary damages. *See Cullen, supra* at ¶¶ 22 and 27, reversing Eighth District decision affirming certification under Rule 23(B)(2) and (B)(3). The trial court imposed so-called “discretionary damages,” which would create millions of dollars of liability to uninjured customers who never had a dispute that implicated the arbitration clause. Consequently, not only are damages primary, an injunctive relief class based on the speculative future “use” of the clause could at best apply to already long-expired disputes, if any.

CONCLUSION

Based on this Court’s recent decision in *Stammco* and *Cullen* and for the reasons set forth above, Defendants-Appellants respectfully urge this Court to accept review, and to further consider whether, under the facts and circumstances, this may be an appropriate case in which to enter judgment summarily pursuant to Sup. Ct. Prac. R. 3.6(B)(3)(b).

Respectfully submitted,


Joseph A. Castrodale (0018494) *T.a.s.*

Counsel of Record

David D. Yeagley (0042433)

ULMER & BERNE LLP

Skylight Office Tower

1660 West 2nd Street, Suite 1100

Cleveland, OH 44113

(216) 583-7000 (phone)

dyeagley@ulmer.com

A. Steven Dever (0024982)

A. Steven Dever Co., LPA

13363 Madison Avenue

Lakewood, Ohio 44107

(216) 228-1166

astevendevery@aol.com

Counsel for Defendants-Appellants

CERTIFICATE OF SERVICE

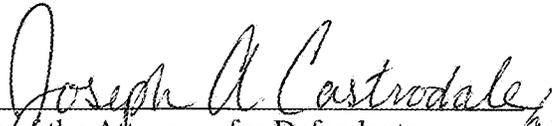
A copy of the foregoing Memorandum In Support of Jurisdiction of Defendants-Appellants Ganley Chevrolet, Inc. and Ganley Management Company has been served this 7th day of November, 2013, by first-class mail, postage prepaid, addressed to:

Lewis Zipkin
ZIPKIN WHITING CO., L.P.A.
The Zipkin Whiting Building
3637 South Green Road
Beachwood, Ohio 44122

-and-

Mark Schlachet
3515 Severn Road
Cleveland Heights, Ohio 44118

Attorneys for the Plaintiffs-Appellees



One of the Attorneys for Defendants-Appellants *att.*

EXHIBIT A

CASE NO. 442143 + 454238

ASSIGNED JUDGE John D. Sotola

Jeffrey Felix et al VS

Bowling Green, Inc, et al

<input type="checkbox"/> 02 REASSIGNED	D I S P O S I T I O N	<input type="checkbox"/> 81 JURY TRIAL	<input type="checkbox"/> 89 DIS. W/PREJ.
<input type="checkbox"/> 03 REINSTATED (C/A)		<input type="checkbox"/> 82 ADR DECREE	<input type="checkbox"/> 91 COGNOVITS
<input type="checkbox"/> 04 REINSTATED		<input type="checkbox"/> 83 COURT TRIAL	<input type="checkbox"/> 92 DEFAULT
<input type="checkbox"/> 20 MAGISTRATE		<input type="checkbox"/> 85 PRETRIAL	<input type="checkbox"/> 93 TRANS TO COURT
<input type="checkbox"/> 40 ADR		<input type="checkbox"/> 86 FOREIGN JUDGMENT	<input type="checkbox"/> 95 TRANS TO JUDGE
<input type="checkbox"/> 65 STAY		<input type="checkbox"/> 87 DIS. W/O PREJ	<input type="checkbox"/> 96 OTHER
<input type="checkbox"/> 69 SUBMITTED		<input type="checkbox"/> 88 BANKRUPTCY/APPEAL STAY	

NO. JURORS _____	COURT REPORTER _____	<input type="checkbox"/> PARTIAL
START DATE ___/___/___	START DATE ___/___/___	<input type="checkbox"/> FINAL
END DATE ___/___/___	END DATE ___/___/___	<input checked="" type="checkbox"/> POST CARD

DATE 08/27/13 (NUNC PRO TUNC ENTRY AS OF & FOR ___/___/___) CLERK OF COI _____

Plaintiff's Motion (# 2242302) Supplemental Motion For an Order of Class Certification and for Judgment on the Merits is granted

OST
JUDGE

JOURNAL

CIVIL CV0142143



said petition on February 7, 2007; and it appearing to the Court that this matter is ripe for class certification and judgment on the merits of certain class claims (as opposed to Plaintiff's individual claims, which are left for later determination), the Court grants class certification as to a Plaintiff Class, denies class certification as to a Defendant Class, and enters partial judgment on the merits in accordance with the findings hereinafter set forth.

Civ.R. 23 sets forth the requirements that plaintiff must meet for the court to certify its proposed class. Courts use a two-step process in analyzing Civ.R. 23. *Warner v. Waste Mgt., Inc.* (1988), 36 Ohio St.3d 91; *Hamilton v. Ohio Savings Bank* (1998), 82 Ohio St. 3d 67. First, the court determines whether the prerequisites of Civ.R. 23(A) are satisfied. *Warner, supra*, at 96-98; *Hamilton, supra*, at 71-79. Second, the court determines whether one of the categories described in Civ.R. 23(B) applies. *Warner, supra*, at 94-96; *Hamilton, supra*, at 79-87. When considering class certification, the trial court may not consider the merits of the case. *Ojalvo v. Bd. of Trustees* (1984), 12 Ohio St.3d 230, 233. Instead, the complaint allegations are accepted as true. *Pyles v. Johnson* (2001), 143 Ohio App.3d 720, 731. Plaintiff bears the burden of proving by the preponderance of evidence that all the prerequisites of Civ.R. 23 are satisfied. *Warner*, 36 Ohio St.3d at 94. *Hoang v. E*Trade Grp., Inc.* (2003), 151 Ohio App.3d 363, 368.

In Civ.R. 23(A), courts recognize two implicit requirements: (1) the identification of an unambiguous class; and (2) membership in the class by the representative plaintiff; and four explicit requirements: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. *Warner, supra*, at 96-98; *Hamilton, supra*, at 71-79.

ANALYSIS

Upon rigorous analysis under Civil Rule 23 of the Ohio Rules of Civil Procedure, the Court has determined that the prerequisites of Rule 23 have been satisfied. **Civil Rule 23(A) requirements**

I. Identifiable Class:

Clearly, there is an identifiable class, consisting as follows:

All consumers of Vehicles from any of the 25 Ganley Companies (see Plaintiff's Chart, Exhibit A, filed August 18, 2003) within the two-year period preceding commencement through the present date (the Class Period), who signed a purchase agreement containing the arbitration clause at suit or one substantially similar thereto. See *Lisa Washington v. Spitzer Management, Inc. et al* (2003), Case No. 81612, 8th Dist.

II. Class Membership:

Defendants instituted the arbitration clause on or about 1998 and the Court need only look at the pre-printed form agreements which Ganley utilized and executed to identify the class and determine whether a given individual is a class member. Plaintiff is a member of the class so defined, having purchased a vehicle from Ganley Chevrolet, Inc., and signed a Purchase Agreement on or about March 2000, containing the subject arbitration clause.

III. Numerosity:

The Court finds that the class as above defined contains thousands of members and is thus so numerous that joinder of all members is impracticable.

IV. Commonality:

The Court finds that this matter concerns a common nucleus of operative facts such that there are questions of fact and law common to all members of the class. These questions include 1) whether a given individual purchased a vehicle from a Ganley dealership during the Class Period, 2) whether she signed a Purchase Agreement identical or substantially identical to that at issue, 3) whether the arbitration clause is violative of the Ohio Consumer Sales Practices Act, 4) and if so, whether the Court should award a classwide damage remedy predicated upon such violation(s) of law.

V. Typicality:

The Court finds that the claims of the representative parties are typical of the claims of the class. There is no express conflict between the representatives and the absent class members. The same unlawful conduct, i.e. the use of the arbitration clause, was directed at the representatives and the class members; and that conduct is the crux of class member claims.

VI. Adequate Representation:

a. Adequacy of the representatives:

The Court finds that the representative parties will fairly and adequately represent the interests of the class. Plaintiff representatives have no interest which is antagonistic to the interests of the class as a whole. Indeed, they are seeking to obtain relief for the class members prior to turning attention to their individual claims.

b. Adequacy of counsel:

Moreover, counsel to the class is experienced and qualified, as evidenced in the hearings before this Court and the reviewing courts wherein such counsel have ably prosecuted the claims of the class.

Civil Rule 23(B) requirements

I. Civil Rule 23(B)(2):

This action must satisfy one of the three elements in Civ.R. 23(B). Plaintiff argues that both subsections (2) and (3) are applicable herein. Civ.R. 23(B)(2) states "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole[.]"

The Court finds that the Ganley defendants have acted on grounds applicable to the class as a whole, thereby making appropriate final injunctive relief and corresponding declaratory relief. As above stated it is the use and enforcement of the arbitration clause which is at issue in this matter. The use of the said clause constitutes a threatened harm to class members as evidenced in the instant case by the litigation of the Defendants Motion to Stay and Motion to Compel Arbitration. The class is cohesive in that each class member executed the same or substantially same Purchase Agreement which failed to satisfy the requirements of the Ohio Consumer Sales Practices Act, by failing to provide certain material information at the time it was due; and the Court will issue relief to protect those class members from prejudice thereby.

II. Civil Rule 23(B)(3):

Civ.R. 23(B)(3) states "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. . . ." Four factors must be taken into consideration:

(a) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (d) the difficulties likely to be encountered in the management of a class action.

a. Predominance of law and fact:

The Court finds that questions of law and fact common to the class predominate over any questions affecting only individual members of the class.

b. Superiority of Class Action:

The Court finds that the class action is superior to other methods for the fair and efficient adjudication of this controversy.

Specifically, it was Defendants' common course of conduct under the direction of defendant Ganley Management Co. and its General Counsel, Russell Harris, which brought forth and regulated the use of the arbitration clause. The use of the arbitration clause, i.e. the Defendants' conduct, is itself the basis for relief. Re-litigating a class member's right to relief over and over again would be a drain on the judiciary and serve no valid purpose. Few if any class members would likely be able to effectively challenge

the Defendants due to the cost of litigation. If they could challenge Defendants, those costs would be improvident, since the illegality of the clause has been decided and affirmed by the Court of Appeals, and the cost of further litigation would be wasteful of judicial and party resources.

Ohio Consumer Sales Practices Act, O.R.C. 1345.

The Court finds that since the hearings of 2004 the Supreme Court of Ohio rendered its decision in *Marrone v. Phillip Morris USA, Inc. (2006)*, 110 Ohio St.3d 5, 2006-Ohio-2869, 850 N.E.2d 31, clarifying the circumstances under which a class action may be maintained under the Ohio Consumer Sales Practices Act, Section 1345.09 of the Ohio Revised Code ("CSPA"). Within the context of a class action against the tobacco companies for false advertising of so-called "light" cigarettes, the Supreme Court held that the challenged conduct must have been determined to be deceptive or unconscionable, for example, under regulations in the Ohio Administrative Code or in prior court decisions made available for public inspection by the Ohio Attorney General in the Public Inspection File.

Since *Marrone* was not decided at the time this case was commenced, the Plaintiffs did not plead satisfaction of its requirements. The Court shall treat portions of Plaintiffs' Supplemental Motion for an Order of Class Certification as a motion to amend the Complaint herein so as to conform to the *Marrone* pleading requirements. To the extent that *Marrone* requires that its unique requirements be pled (as opposed to set forth in other filings), the Court orders the Fifth Amended Complaint amended accordingly.

The Court finds that the *Marrone* requirements are met in this case. Plaintiff has alleged that the arbitration clause is in violation of Ohio Administrative Code 109:4-3-

16(B)(22), which prohibited the failure, in the business of selling automobiles, to integrate all material statements. However, the legislature has since then repealed said section under the ruling in *Williams v. Spitzer Autoworld Canton, L.L.C.* (2009), 122 Ohio St. 3d 546, 551. Nevertheless, in keeping with the Ohio Consumer Sales Practices Act's prohibition on unfair or deceptive and unconscionable acts and practices, the Supreme Court in *Williams v. Spitzer Autoworld Canton, L.L.C.* made it clear that only "To the extent that Ohio Adm. Code 109:4-3-16(B)(22) conflicts with the parole evidence rule as codified by R.C. 1302.05 and allows parole evidence contradicting the final written contract, Ohio Adm. Code 109:4-3-12(B)(22) constitutes an unconstitutional usurpation of the General Assembly's legislative function and is therefore invalid." *Id.* at 551-552. This court finds that in the instant case the parole evidence rule was not an issue regarding the Defendants failure to integrate all material statements upon their use of the arbitration clause. This Court and The Eighth Judicial District Court of Appeals have decided that Defendants violated that regulation when they failed to advise consumers as to the rules of the American Arbitration Association and the fees associated therewith. The OAC provision has been the subject of numerous court decisions which have been filed in the Attorney General's Public Information File. See *Smith v. Discount Auto Sales*, 97 CV 120022 (Lorain Cty. 1999), PIF No. 10001735; *Renner v. Derin Acquisition Corp.*, No. 69181 (Cuy. Cty. 1996), PIF No. 10001587. Therefore, the acts and practices contained within these decisions gave the required notice to the Defendants under 1345.09. These and other CSPA decisions gave ample notice to Defendants, as required by *Marrone*, that all material terms must be included in a written contract for the sale an automobile in Ohio.

Unlike *Marrone*, where the Supreme Court was persuaded that the aggregate of regulatory agencies impacting tobacco advertising rendered analogous situations *not* substantially similar to tobacco, Defendants here did not produce a sound reason why they failed to integrate material statements into their pre-printed Purchase Agreements. The OAC regulation which they violated is industry specific, and suggests a strong public policy of full disclosure in automobile sales.

The Court finds that CSPA permits, if it does not require, the Court to award monetary damages to consumers victimized by Defendants' violation of law. To allow Defendants to emerge from this seven-year legal battle, during which time they continued to use the offending clause, without sanction, would defeat the policies underlying CSPA and the rule of law. It would reward lawlessness aimed primarily at consumers.

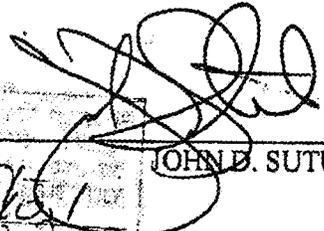
The Ohio Legislature set a minimum damage award of \$200 for individual violations of the CSPA. In *State v. Rose Chevrolet, Inc.* (1993), CA91-12-214, 1993 Ohio App. LEXIS 3281, PIF 10001321, the Court set class member damages at \$500 for classwide misrepresentations as to vehicle history. This case, though not as severe as *Rose Chevrolet*, presents a significant violation of law. Consumers were denied material information concerning their recourse and against the vehicle merchant, should they have need for recourse. The Court will exercise its discretion and grant damages of \$200 per class member.

IT IS THEREFORE ORDERED:

1. Plaintiffs' Motion for Class Certification of a Plaintiff Class is granted under Civil Rules 23(B)(2)-(3) in accordance with the above findings;
2. Plaintiffs' Motion for Class Certification, to the extent it seeks certification of a Defendant Class is denied;

3. Plaintiffs and Plaintiff Class are awarded judgment, without prejudice to Representative Plaintiffs' individual claims, for violations of CSPA, Section 1345.02(B);
4. Representative Plaintiffs are, and each member of Plaintiff Class is, awarded damages in the amount of \$200 (not to exceed one award per vehicle), for which Defendant Ganley Management Co. shall be liable in full, while Defendant Ganley Chevrolet, Inc. shall be liable to only those class members to whom it sold vehicles;
5. Within 30 days hereof, pursuant to Rule 23(C), the parties shall jointly propose a plan for notice to class members, and distribution of judgment proceeds to those class members who do not request exclusion under Rule 23(C)(2). Defendants shall provide Plaintiffs' counsel with a full disclosure as to the means by which class members may be contacted at their last known address;
6. Defendant shall file a list of the names and addresses of all class members or potential class members within said time, consisting of all natural-person vehicle purchases from the Ganley Companies during the Class Period;
7. To the extent Defendants cannot determine whether an iteration of the arbitration clause is substantially similar to that which Plaintiffs signed (and, therefore, whether the consumer is within the class), Defendants shall present the clause to the Court, in an appropriate filing, and to Plaintiffs' counsel, within 15 days hereof, in writing. Defendant Ganley Management Co. shall also file within said time copies of any Purchase Agreements used during the Class Period in the sale of vehicles, by any Ganley Company, containing an arbitration clause which said Defendant believes is not substantially similar to that received by Representative Plaintiffs;
8. Within 30 days hereof, Defendant shall file a proposed claim form for use in instances where Defendant questions whether a given car purchaser bought his or her vehicle primarily for personal, family or household purposes;
9. Plaintiffs shall be entitled to costs herein, including the cost of notice and distribution of judgment proceeds, together with a reasonable attorneys fee to be determined by the Court upon notice; and
10. The Court shall conduct a status meeting with counsel to discuss the above and such other matters as shall be appropriate on the 10 day of September, 2012.

IT IS SO ORDERED.



 JOHN B. SUTULA

RECEIVED FOR FILING

SEP 10 2012

GERALD DEPUERST, CLERK
 By [Signature] Deputy

Order to be filed Sept 10, 2012
Sept 12 187

EXHIBIT B

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 98985

JEFFREY FELIX, ET AL.

PLAINTIFFS-APPELLEES

vs.

GANLEY CHEVROLET, INC., ET AL.

DEFENDANTS-APPELLANTS

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CV-442143 and CV-454238

BEFORE: Kilbane, J., Jones, P.J., and Rocco, J.

RELEASED AND JOURNALIZED: August 15, 2013

ATTORNEYS FOR APPELLANTS

David D. Yeagley
Elizabeth M. Hill
Ulmer & Berne L.L.P.
Skylight Office Tower
1660 West 2nd Street, Suite 1100
Cleveland, Ohio 44113

A. Steven Dever
A. Steven Dever Co., L.P.A.
13363 Madison Avenue
Lakewood, Ohio 44107

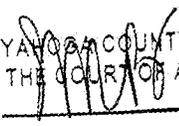
ATTORNEYS FOR APPELLEES

Lewis A. Zipkin
Zipkin Whiting Co., L.P.A.
3637 South Green Road
Beachwood, Ohio 44122

Mark Schlachet
3515 Severn Road
Cleveland Heights, Ohio 44118

FILED AND JOURNALIZED
PER APP.R. 22(C)

AUG 15 2013

CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By  Deputy

MARY EILEEN KILBANE, J.:

{¶1} Defendants-appellants, Ganley Chevrolet, Inc. (“Ganley Chevrolet”) and Ganley Management Company (“Ganley Management”) (collectively referred to as “Ganley”), appeal from the trial court’s order certifying a class action brought by plaintiffs-appellees, Jeffrey and Stacy Felix (collectively referred to as “the Felixes”), under the Ohio Consumer Sales Practices Act (“CSPA”). For the reasons set forth below, we affirm.

{¶2} The facts giving rise to the instant appeal were set forth by this court in Ganley’s previous appeal, *Felix v. Ganley Chevrolet, Inc.*, 8th Dist. Cuyahoga Nos. 86990 and 86991, 2006-Ohio-4500, *discretionary appeal not allowed*, 112 Ohio St.3d 1470, 2007-Ohio-388, 861 N.E.2d 144.

[The Felixes] brought two actions against Ganley.¹ In both actions, the appellees filed class action complaints alleging consumer sales practices violations and seeking declaratory and injunctive relief.

The Felixes allege in the first action that on March 24, 2001, they went to Ganley to purchase a 2000 Chevy Blazer. The Felixes claim that as an incentive to sign the contract to purchase the vehicle, Ganley informed them that they were approved for 0.0% financing but that the offer would expire that evening. The purchase contract contained an arbitration clause that required “any dispute between you and dealer (seller) will be resolved by binding arbitration.”²

¹The first action, Cuyahoga C.P. No. CV-442143 and 8th Dist. Cuyahoga No. 86991, was brought against Ganley Chevrolet, Inc., as representative of various Ganley dealerships, and against Ganley Management Co. The second action, Cuyahoga C.P. No. CV-454238 and 8th Dist. Cuyahoga No. 86990, was brought against Ganley Chevrolet, Inc., and all Ganley companies.

²The arbitration provision at issue, which appeared in the sales agreement states:

Jeffrey Felix signed under the arbitration clause and at the foot of the purchase contract, relying on Ganley's representation of 0.0% financing. The purchase contract provided that it was "not binding unless accepted by seller and credit is approved, if applicable, by financial institution." Jeffrey Felix also signed a conditional delivery agreement that specified that "the agreement for the sale/lease of the vehicle described above is not complete pending financing approval * * * and that the consummation of the transaction is specifically contingent on my credit worthiness and ability to be financed."

The Felixes traded in their van as part of the purchase. They allege Ganley insisted the Felixes take the Chevy Blazer home for the weekend. The Felixes claim that when they returned the following Monday to sign the promissory note and security agreement, they were told that GMAC (the financing institution) would only approve their financing at 1.9%, not at the 0.0% that was originally represented. The Felixes agreed to the 1.9% rate and signed the promissory note. More than a month later, the Felixes were informed that GMAC decided not to approve the 1.9% financing. Ganley then informed the Felixes that they could obtain 9.44% financing with Huntington Bank. The Felixes refused to execute a new agreement at the higher interest rate. The Felixes retained the vehicle and have been placing money into escrow for the purchase of the vehicle.

ARBITRATION — ANY DISPUTE BETWEEN YOU AND DEALER (SELLER) WILL BE RESOLVED BY BINDING ARBITRATION. YOU GIVE UP YOUR RIGHT TO GO TO COURT TO ASSERT YOUR RIGHTS IN THIS SALES TRANSACTION (EXCEPT FOR ANY CLAIM IN SMALL CLAIMS COURT). YOUR RIGHTS WILL BE DETERMINED BY A NEUTRAL ARBITRATOR, NOT A JUDGE OR JURY. YOU ARE ENTITLED TO A FAIR HEARING, BUT ARBITRATION PROCEDURES ARE SIMPLER AND MORE LIMITED THAN RULES APPLICABLE IN COURT. ARBITRATOR DECISIONS ARE AS ENFORCEABLE AS ANY COURT ORDER AND ARE SUBJECT TO A VERY LIMITED REVIEW BY A COURT. SEE GENERAL MANAGER FOR INFORMATION REGARDING ARBITRATION PROCESS.

In the first action, under the fourth amended complaint, [the Felixes claim] that the arbitration clause utilized by Ganley was unconscionable and that various practices of Ganley pertaining to the clause violated the Ohio Consumer Sales Practices Act ("the Ohio CSPA"). The first three causes of action were raised as to the representative class. Count one alleges unconscionability of the arbitration clause; counts two and three allege unfair and deceptive consumer sales practices.

Counts four through six were the Felixes' individual claims. Counts four and five allege unfair and deceptive consumer sales practices concerning Ganley's "bait and switch tactics." Under count four, the Felixes claim that Ganley misrepresented to the Felixes that they were approved for financing, when no such approval was given, in order to get the Felixes to agree to purchase the vehicle later at higher interest rates. They further claim Ganley submitted a credit application to Huntington without authorization from the Felixes and in complete disregard of their privacy. Under count five, the Felixes allege that Ganley deceived Jeffrey Felix with respect to the conditional delivery agreement, and failed to incorporate into the security agreement that the Felixes were not, in fact, approved for financing with GMAC. Count six is a claim for intentional infliction of emotional distress with respect to the alleged misrepresentations Ganley made to the Felixes regarding the financing of the vehicle.

In the second action, the second amended complaint focuses entirely on the arbitration clause itself. Count one is a claim that the clause is unconscionable. Counts two through four claim unfair and deceptive consumer sales practices by Ganley with respect to the arbitration clause. Count five claims Ganley made false statements, representations, and disclosures of fact and defrauded customers as to the arbitration clause. In the second action, there are no direct allegations pertaining to the interest-rate representations made to the Felixes as were alleged in the first action.

In both cases, Ganley filed a motion for stay of proceedings, requesting that the matters be stayed pending arbitration in accordance with the arbitration agreement contained within the parties' purchase contract.

Following a consolidated hearing on the motions, the trial court denied the motions without opinion.

Id. at ¶ 2-10.

{¶3} Ganley appealed the trial court's denial of its motion to stay pending arbitration, arguing the trial court had erred in determining that the arbitration provision was unenforceable. The issue before us at that time was "whether the dispute between the parties is governed by a valid, enforceable agreement to arbitrate." *Id.* at ¶ 13. We affirmed the trial court's ruling, concluding that the arbitration provision included in the purchase agreement was substantively and procedurally unconscionable and was, therefore, unenforceable against appellees. *Id.* at ¶ 28.

{¶4} Following our decision, the Felixes filed a "Supplemental Motion for an Order of Class Certification and for Judgment on the Merits" at the trial court, requesting that the trial court certify a class under both Civ.R. 23(B)(2) and (B)(3) in October 2007. They argued that our ruling that the arbitration provision was unconscionable established "CSPA violations which apply to each and every class member." As to its class claim in the first action, the Felixes sought judgment in favor of the purported class on the CSPA claim and requested that each class member be awarded \$200 in damages. They also requested that the court issue injunctive relief, enjoining the continued use of the arbitration provision and any substantially similar provisions. With respect

to the second action, appellees sought a “final judgment on the merits for the entire case” in the form of a declaratory judgment stating that Ganley’s inclusion of the unconscionable arbitration clause in its automobile sales agreements violated the CSPA.

{¶5} Ganley filed a brief in opposition, arguing the Felixes could not maintain a class action under R.C. 1345.09(B) and establish certain prerequisites to class certification under Civ.R. 23, and that due to the public policy favoring arbitration, inclusion of an arbitration provision in a sales agreement could not violate the CSPA. After several years of extensive litigation, the trial court issued judgment entries in both cases in September 2012. In its “Proposed Order of Class Certification and for Partial Judgment on the Merits,” the trial court certified the following plaintiff class under Civ.R. 23(B)(2) and (B)(3):

All consumers of Vehicles from any of the 25 Ganley Companies (see Plaintiff’s Chart, Exhibit A, filed August 18, 2003) within the two-year period preceding commencement through the present date (the Class Period), who signed a purchase agreement containing the arbitration clause at suit or one substantially similar thereto.

{¶6} In addition to certifying the class, the trial court held that Ganley’s inclusion of the subject arbitration provision in its purchase agreements with consumers violated the CSPA and established a basis for classwide relief under Civ.R. 23(B)(2) and (B)(3). In its rigorous opinion granting class certification, the trial court wrote:

The Court finds that the Ganley defendants have acted on grounds applicable to the class as a whole, thereby making appropriate final injunctive relief and corresponding declaratory relief. * * * [I]t is the use and enforcement of the arbitration clause which is at issue in this matter. The use of the said clause constitutes a threatened harm to class members as evidenced in the instant case by the litigation of the Defendant[s] Motion to Stay and Motion to Compel Arbitration. The class is cohesive in that each class member executed the same or substantially same Purchase Agreement which failed to satisfy the requirements of the [CSPA], by failing to provide certain material information at the time it was due; and the Court will issue relief to protect those class members from prejudice thereby.

* * *

Specifically, it was Defendants' common course of conduct under the direction of defendant Ganley Management Co. and its General Counsel * * * which brought forth and regulated the use of the arbitration clause. The use of the arbitration clause, i.e., the Defendants' conduct, is itself the basis for relief. Re-litigating a class member's right to relief over and over again would be a drain on the judiciary and serve no valid purpose. Few if any class members would likely be able to effectively challenge the Defendants due to the cost of litigation. If they could challenge Defendants, those costs would be improvident, since the illegality of the clause has been decided and affirmed by the Court of Appeals, and the cost of further litigation would be wasteful of judicial and party resources.

{¶7} The trial court also ruled that, based on Ganley's conduct, a classwide award of damages was warranted under the CSPA:

The Court finds that CSPA permits, if it does not require, the Court to award monetary damages to consumers victimized by Defendants' violation of law. To allow Defendants to emerge from this seven-year legal battle, during which time they continued to use the offending clause, without sanction, would defeat the policies underlying CSPA and the rule of law. It would reward lawlessness aimed primarily at consumers.

Concluding that the case “presents a significant violation of law,” the court “exercise[d] its discretion” and awarded \$200 in damages per transaction to each class member.

{¶8} It is from this order that Ganley now appeals, raising the following single assignment of error for review.

Assignment of Error

[T]he trial court erred as a matter of law and abused its discretion in certifying, for purposes of a claim under the [CSPA], a class of customers who signed purchase agreements that included an arbitration provision.

Standard of Review

{¶9} A trial court has broad discretion in determining whether to certify a class action, and an appellate court should not disturb that determination absent an abuse of discretion. *Marks v. C.P. Chem. Co.*, 31 Ohio St.3d 200, 509 N.E.2d 1249 (1987), syllabus. “The term ‘abuse of discretion’ connotes more than an error of law or judgment; it implies that the court’s attitude is unreasonable, arbitrary or unconscionable.” (Citations omitted.) *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983), quoting *State v. Adams*, 62 Ohio St.2d 151, 404 N.E.2d 144 (1980). In *Hamilton v. Ohio Sav. Bank*, 82 Ohio St.3d 67, 694 N.E.2d 442 (1998), the Ohio Supreme Court noted that “the appropriateness of applying the abuse-of-discretion standard in reviewing class action determinations is grounded * * * in the trial court’s

special expertise and familiarity with case-management problems and its inherent power to manage its own docket.” *Id.* at 70, citing *Marks; In re NLO, Inc.*, 5 F.3d 154 (6th Cir.1993). “A finding of abuse of discretion * * * should be made cautiously.” *Marks* at 201.

{¶10} The *Hamilton* court further noted that the trial court’s discretion in deciding whether to certify a class must be exercised within the framework of Civ.R. 23. *Id.* The trial court is required to “carefully apply the class action requirements” and to conduct a “rigorous analysis” into whether the prerequisites for class certification under Civ.R. 23 have been satisfied. *Id.*

Requirements for Class Action Certification

{¶11} In determining whether a class action is properly certified, the first step is to ascertain whether the threshold requirements of Civ.R. 23(A) have been met. Once those requirements are established, the trial court must turn to Civ.R. 23(B) to discern whether the purported class comports with the factors specified therein. Accordingly, before a class may be properly certified as a class action, the following seven prerequisites must be met: (1) an identifiable class must exist, and the definition of the class must be unambiguous; (2) the named plaintiff representatives must be members of the class; (3) the class must be so numerous that joinder of all the members is impracticable; (4) there must be questions of law or fact common to the class; (5) the claims or defenses of the representatives must be typical of the claims or defenses of the class; (6) the

representative parties must fairly and adequately protect the interests of the class; and (7) one of the three requirements under Civ.R. 23(B) must be met. *Hamilton* at 71, citing Civ.R. 23(A) and (B); *Warner v. Waste Mgt. Inc.*, 36 Ohio St.3d 91, 96, 521 N.E.2d 1091 (1988).

Application of Class Action Requirements

{¶12} Ganley argues that the trial court erred in certifying the class because the class definition and time period are overbroad and ambiguous. Ganley further argues that the commonality, predominance, and typicality prerequisites to class certification under Civ.R. 23(A) and (B)(3) were not established and that there was no showing that “final injunctive relief or corresponding declaratory relief” was appropriate “with respect to the class as a whole” for class certification under Civ.R. 23(B)(2). We disagree.

{¶13} As an initial matter, we note that a recurring theme in Ganley’s argument is the notion that, due to the public policy favoring arbitration of disputes, “there is and can be no [CSPA] violation based upon the inclusion of an arbitration provision in a contract.” Ganley, however, misconstrues the Felixes’ theory of liability under the CSPA. The Felixes do not contend that Ganley’s inclusion of any arbitration clause in a consumer sales contract violates the CSPA. Rather, they contend that Ganley’s inclusion of this particular arbitration provision, which this court found to be misleading, confusing, and substantively unconscionable, or a substantially similar provision, in its

automobile sales agreements constitutes an unfair and deceptive practice under the CSPA. We agree that such allegations constitute an unfair or deceptive practice giving rise to a claim under the CSPA. *See also Eagle v. Fred Martin Motor Co.*, 157 Ohio App.3d 150, 2004-Ohio-829, 809 N.E.2d 1161, ¶ 28 (9th Dist.) (stating that “it is conceivable that a complainant may allege that an arbitration clause itself may violate R.C. Chapter 1345[.]”)

{¶14} Ganley further argues that the individualized assessment necessary for a determination of procedural unconscionability must, in and of itself, preclude any form of classwide relief. However, there is a difference between the proof required to establish an unfair and deceptive practice under the CSPA and the proof required to establish the contractual defense of unconscionability. The fact that an arbitration provision is generally “presumed valid” or that the contractual defense of unconscionability requires both substantive unconscionability and an individualized, case-by-case assessment of procedural unconscionability before a contract provision is determined to be unenforceable does not preclude a finding that inclusion of a misleading, confusing, and substantively unconscionable arbitration provision in a consumer sales contract constitutes an unfair and deceptive practice under the CSPA. As it relates to the claims of the putative class, the issue in the instant case is not whether the arbitration provision was substantively and procedurally unconscionable, and thus unenforceable, under contract law principles, but rather, whether the

provision violated the CSPA for reasons that apply classwide, irrespective of procedural unconscionability.

{¶15} Therefore, Ganley's arguments based on the public policy favoring arbitration and the requirements for establishing procedural unconscionability as a matter of contract law do not preclude class certification in this case.

{¶16} We now review the detailed findings made by the trial court.

(1) Identifiable Class

{¶17} Civ.R. 23 requires that an identifiable class must exist and the definition of the class must be unambiguous. This requirement "will not be deemed satisfied unless the description of [the class] is sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member. Thus, the class definition must be precise enough to permit identification within a reasonable effort." (Internal quotations and citations omitted.) *Hamilton*, 82 Ohio St.3d at 71-72, 694 N.E.2d 442.

{¶18} In the instant case, the trial court found that the Felixes' proposed class was identifiable, consisting of:

All consumers of Vehicles from any of the 25 Ganley Companies (see plaintiff's chart, Exhibit A, filed August 18, 2003) within the two-year period preceding commencement through the present date (the Class Period), who signed a purchase agreement containing the arbitration clause at suit or one substantially similar thereto.

We are mindful that "[t]he focus at this stage is on how the class is defined. The test is whether the means is specified at the time of certification to determine

whether a particular individual is a member of the class.” (Citation omitted.)

Hamilton at 73.

{¶19} A plain reading of the class definition dictates that the class is limited to consumers who purchased vehicles from any of the 25 Ganley companies within the two-year period preceding commencement of the Felixes’ original complaint filed on June 18, 2001. Based on this definition, it would be administratively feasible to determine whether a particular person is a member of the class. Therefore, the identifiable class requirement is satisfied.

(2) Class Membership

{¶20} The class membership prerequisite requires only that “the representative have proper standing. In order to have standing to sue as a class representative, the plaintiff must possess the same interest and suffer the same injury shared by all members of the class that he or she seeks to represent.” (Citation omitted.) *Hamilton*, 82 Ohio St.3d at 74, 694 N.E.2d 442.

{¶21} Here, the trial court found that Ganley

instituted the arbitration clause on or about 1998 and the Court need only look at the pre-printed form agreements which Ganley utilized and executed to identify the class and determine whether a given individual is a class member. Plaintiff is a member of the class so defined, having purchased a vehicle from Ganley Chevrolet, Inc., and signed a Purchase Agreement on or about March 2000, containing the subject arbitration clause.

The Felixes and the class members possess the same interest and suffer the same injury — individuals who purchased a vehicle from Ganley Chevrolet, Inc.,

and signed a purchase agreement containing the subject arbitration clause. Thus, the class membership requirement is satisfied.

(3) Numerosity

{¶22} Civ.R. 23(A) provides that “one or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable[.]” Here, the trial court found that “the class as * * * defined contains thousands of members and is thus so numerous that joinder of all members is impracticable.” In *Hamilton*, the Ohio Supreme Court found that a class with at least 2,700 possible class members satisfies the numerosity requirement. *Id.* at 75. The court stated, “[t]his number alone is sufficient to establish that the class is so numerous that joinder of all members is impracticable.” (Citations omitted.) *Id.* Similarly, the instant class consists of “thousands of members.” Thus, the numerosity requirement is satisfied.

(4) Commonality

{¶23} Civ.R. 23(A)(2) requires the presence of “questions of law or fact common to the class.” “Courts generally give this requirement a permissive application. It is not necessary that all the questions of law or fact raised in the dispute be common to all the parties. If there is a common nucleus of operative facts, or a common liability issue, the rule is satisfied.” (Citations omitted.)

Hamilton, 82 Ohio St.3d at 77, 694 N.E.2d 442. In the instant case, the trial court found that:

this matter concerns a common nucleus of operative facts such that there are questions of fact and law common to all members of the class. These questions include 1) whether a given individual purchased a vehicle from a Ganley dealership during the Class Period, 2) whether she signed a Purchase Agreement identical or substantially identical to that at issue, 3) whether the arbitration clause is violative of the [CSPA], 4) and is so, whether the Court should award a classwide damage remedy predicated upon such violation(s) of law.

{¶24} Ganley's alleged violation of the CSPA, based on inclusion of the incomplete and misleading arbitration provision in its consumer sales agreements creates such a common, class-wide contention. Accordingly, the commonality prerequisite is satisfied.

(5) Typicality

{¶25} "The requirement for typicality is met where there is no express conflict between the class representatives and the class." *Hamilton* at 77. Here, the trial court found that:

the claims of the representative parties are typical of the claims of the class. There is no express conflict between the representatives and the absent class members. The same unlawful conduct, i.e., the use of the arbitration clause, was directed at the representatives and the class members; and that conduct is the crux of class member claims.

{¶26} This same conduct gives rise to the claims of the other putative class members, and the claims are governed by the same legal theory — that Ganley's

inclusion of such a provision in their sales agreements violated the CSPA. Thus, the typicality prerequisite is satisfied.

(6) Adequate Representation

{¶27} A class representative is “deemed adequate so long as his or her interest is not antagonistic to that of other class members.” (Citations omitted.) *Id.* at 78. In the instant case, the trial court found that “the representative parties will fairly and adequately represent the interests of the class. Plaintiff representatives have no interest which antagonistic to the interest of the class as a whole. Indeed, they are seeking to obtain relief for the class members prior to turning attention to their individual claims.” Accordingly, the Felixes are adequate class representatives.

(7) Civ.R. 23(B) Requirements

{¶28} Having determined that the requirements of Civ.R. 23(A) have been met, we now look to Civ.R. 23(B). Here, the trial court found that the class action could be maintained under both Civ.R. 23(B)(2) and (3), which provide that a class action may be maintained if the prerequisites of Civ.R. 23(A) are satisfied, and

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only

individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (a) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (d) the difficulties likely to be encountered in the management of a class action.

{¶29} Ganley argues that the trial court's class certification under Civ.R. 23(B)(2) was improper because there is no relief that would be appropriate for the class as a whole since relief could only be awarded on the basis of individualized proof of procedural unconscionability, and Civ.R. 23(B)(2) is inapplicable when the primary relief requested is damages.

{¶30} In the instant case, the trial court determined that Ganley "acted on grounds applicable to the class as a whole, thereby making appropriate final injunctive relief and corresponding declaratory relief." The court reasoned that the use and enforcement of the arbitration clause "constitutes a threatened harm to class members as evidenced * * * by the litigation of the Defendants' Motion to Stay and Motion to Compel Arbitration." The court further stated that

[t]he class is cohesive in that each class member executed the same or substantially same Purchase Agreement which failed to satisfy the requirements of the [CSPA], by failing to provide certain material information at the time it was due; and the Court will issue relief to protect those class members from prejudice thereby.

{¶31} Under Civ.R. 23(B)(2), the plaintiff must show that the defendant's actions impact the entire class and that final injunctive or declaratory relief is appropriate. "Certification under Civ.R. 23(B)(2) depends upon what type of relief is primarily sought, so where the injunctive relief is merely incidental to the primary claim for money damages, Civ.R. 23(B)(2) certification is inappropriate." *Wilson v. Brush Wellman, Inc.*, 103 Ohio St.3d 538, 2004-Ohio-5847, 817 N.E.2d 59, ¶17, citing *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180 (9th Cir.2001).

{¶32} As discussed above, the use of the arbitration clause is at issue, not procedural unconscionability as Ganley contends. The use of the arbitration clause constitutes a threat to the class as a whole. The Ohio Supreme Court has stated:

"Disputes over whether the action is primarily for injunctive or declaratory relief rather than a monetary award neither promote the disposition of the case on the merits nor represent a useful expenditure of energy. Therefore, they should be avoided. If [Civ.R. 23(A)] prerequisites have been met and injunctive or declaratory relief has been requested, the action usually should be allowed to proceed under [Civ.R. 23(B)(2)]."

Hamilton, 82 Ohio St.3d at 87, 694 N.E.2d 442, quoting Wright, Miller & Kane, *Federal Practice and Procedure*, Section 1775, at 470 (2d Ed.1986). Accordingly, the class is maintainable under Civ.R. 23(B)(2).

{¶33} With respect to Civ.R. 23(B)(3), Ganley argues the trial court erred in certifying an "all customers" class because it "extends beyond the scope of the

statute" and includes individuals who have no claim and who have sustained no actual damages as a result of Ganley's inclusion of the arbitration provision in its sales agreements.

{¶34} Civ.R. 23(B)(3) provides that in order to certify a class in an action for damages, the trial court must make two findings. First, it must find that questions of law or fact common to the members of the class predominate over any questions affecting only individual members; and second, the court must find that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. In its analysis under Civ.R. 23(B)(3), the trial court found that:

questions of law and fact common to the class predominate over any questions affecting efficient adjudication of this controversy.

Specifically, it was Defendants' common course of conduct under the direction of defendant Ganley Management Co. and its General Counsel * * * which brought forth and regulated the use of the arbitration clause. The use of the arbitration clause, i.e., the Defendants' conduct, is itself the basis for relief. Re-litigating a class member's right to relief over and over again would be a drain on the judiciary and serve no valid purpose. Few if any class members would likely be able to effectively challenge the Defendants due to the cost of litigation. If they could challenge Defendants, those costs would be improvident, since the illegality of the clause has been decided and affirmed by the Court of Appeals, and the cost of further litigation would be wasteful of judicial and party resources.

{¶35} The Ohio Supreme Court has stated that:

the common questions must represent a significant aspect of the case and they must be able to be resolved for all members of the

class in a single adjudication. And, in determining whether a class action is a superior method of adjudication, the court must make a comparative evaluation of the other procedures available to determine whether a class action is sufficiently effective to justify the expenditure of judicial time and energy involved therein.

Schmidt v. Avco Corp., 15 Ohio St.3d 310, 313, 473 N.E.2d 822 (1984), citing Wright & Miller, *Federal Practice and Procedure*, Section 1779, at 59 (1972) .

{¶36} Here, as the trial court found, the common questions of law and fact arise from Ganley's common course of conduct, which brought forth and regulated the use of the arbitration clause. Furthermore, the claims of the putative class members arise from the arbitration clause. The trial court noted that the costs of individual litigation would be improvident, since the illegality of the clause has been affirmed by this court, and the cost of further litigation would be wasteful of judicial and party resources. The Ohio Supreme Court has found that

the trial court is in the best position to consider the feasibility of gathering and analyzing class-wide evidence. Since the trial court's ruling did not exceed the bounds of reasonableness, we find that it acted within its discretion in resolving that there are common questions of fact among class members that can be presented in an efficient fashion.

In re Consol. Mtge. Satisfaction Cases, 97 Ohio St.3d 465, 2002-Ohio-6720, 780 N.E.2d 556, ¶ 12. Likewise, we find that the trial court in the instant case properly concluded that the Felixes satisfied Civ.R. 23(B)(3).

Class Actions and the CSPA

{¶37} Although the Felixes have satisfied the Civ.R. 23 requirements for certifying a class action, we must now turn to the requirements of R.C. 1345.09(B), because classwide relief is sought for an alleged violation of the CSPA.

{¶38} “R.C. 1345.09(B) provides that a consumer may qualify for class-action status only when a supplier acted in the face of prior notice that its conduct was deceptive or unconscionable. The prior notice may be in the form of (1) a rule adopted by the Attorney General under R.C. 1345.05(B)(2) or (2) a court decision made available for public inspection by the Attorney General under R.C. 1345.05(A)(3).” *Marrone v. Philip Morris USA, Inc.*, 110 Ohio St.3d 5, 2006-Ohio-2869, 850 N.E.2d 31, ¶ 9. Cases that “involve industries and conduct very different from the defendant’s do not provide meaningful notice of specific acts or practices that violate the CSPA.” *Id.* at ¶ 21. Likewise, general administrative rules are “not sufficient to put a reasonable person on notice” that a specific act or practice is prohibited. *Id.* at ¶ 23. Rather,

[p]rior notice may * * * be in the form of “an act or practice declared to be deceptive or unconscionable by rule adopted under [R.C. 1345.05(B)(2)].” R.C. 1345.09(B). R.C. 1345.05(B)(2) authorizes the Attorney General to “[a]dopt, amend, and repeal substantive rules defining with reasonable specificity acts or practices that violate sections [R.C. 1345.02 and 1345.03].”

Id. at ¶ 22.

{¶39} Ganley argues that the trial court abused its discretion in certifying the class because the prior notice requirement in R.C. 1345.09(B) for maintaining a CSPA class action was not met. Ganley contends that the class “extends beyond the scope” of the CSPA. We disagree.

{¶40} In the instant case, the trial court held that the prior notice requirement set forth in R.C. 1345.09(B) and *Marrone* was met by Ohio Adm.Code 109:4-3-16(22) and two prior court decisions contained in the Attorney General’s public inspection file involving unfair and deceptive practices in connection with motor vehicle sales. The trial court concluded that Ohio Adm.Code 109:4-3-16(22) and the acts and practices contained within the prior decisions gave the required notice to Ganley under R.C. 1345.09 — that all material terms must be included in a written contract for the sale of an automobile in Ohio.

{¶41} Ohio Adm.Code 109:4-3-16(22) provides that

It shall be a deceptive and unfair act or practice for a dealer, manufacturer, advertising association, or advertising group, in connection with the advertisement or 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[.]³ (Emphasis added.)

³It is not entirely clear, following the Ohio Supreme Court’s decision in *Williams v. Spitzer Autoworld Canton, L.L.C.*, 122 Ohio St.3d 546, 2009-Ohio-3554, 913 N.E.2d 410, whether Ohio Adm.Code 109:4-3-16(B)(22) remains a viable basis upon which to base a CSPA violation at least “absent proof of fraud, mistake, or other invalidating cause.” *Id.* at ¶ 20. In *Williams*, the Ohio Supreme Court held that “[t]o the extent

{¶42} The trial court held that Ganley “fail[ed] to integrate all material statements upon [its] use of the arbitration clause” and “violated [Ohio Adm.Code 109:4-3-16(B)(22)] when [it] failed to advise consumers as to the rules of the American Arbitration Association and the fees associated therewith.” We agree. The arbitration clause at issue was found to be incomplete and misleading because did not include important and material information. By failing to integrate “all material statements” in the purchase agreement, the arbitration clause violates Ohio Adm.Code 109:4-3-16(B)(22).

{¶43} The trial court also found that two decisions in the public inspection file, *Smith v. Discount Auto Sales*, Lorain C.P. No. 97 CV 120022 (Mar. 19, 1998), PIF No. 10001735, and *Renner v. Derin Acquisition Corp.*, 111 Ohio App.3d 326, 676 N.E.2d 151 (8th Dist.1996), PIF No. 10001587, gave the required notice under R.C. 1345.09. Both decisions involve the same industry — automobile sales — automobile sales agreements, and the dealer’s omission of allegedly material information from an automobile sales agreement. Both

that [Ohio Adm.Code] 109:4-3-16(B)(22) conflicts with the parol evidence rule as codified by R.C. 1302.05 and allows parol evidence contradicting the final written contract, Ohio Adm.Code 109:4-3-16(B)(22) constitutes an unconstitutional usurpation of the General Assembly’s legislative function and is therefore invalid.” *Id.* at paragraph one of the syllabus. The court further held that Ohio Adm.Code 109:4-3-16(B)(22) was “not enforceable” due to its conflict with R.C. 1302.05. *Id.* at ¶ 22. In addressing the impact of *Williams*, the trial court stated that “in the instant case[,] the [parol] evidence rule was not an issue regarding [Ganley’s] failure to integrate all material statements upon their use of the arbitration. This Court and the Eighth Judicial District Court of Appeals have decided that [Ganley] violated that regulation when [it] failed to advise consumers as to the rules of the American Arbitration Association and the fees associated therewith.”

Smith and *Renner* involved the failure to integrate material terms of the parties' agreement, to which the parties had allegedly previously agreed, in the sales contract. The conduct and practices at issue in those cases were similar to the conduct at issue here, i.e., Ganley's inclusion of an incomplete and misleading arbitration provision in its sales agreement. Therefore, these decisions provided "meaningful notice" to Ganley that its conduct was unfair and deceptive under *Marrone* and R.C. 1345.09(B). Accordingly, the Felixes satisfied the prior notice requirement and the trial court did not abuse its discretion in certifying the class under the CSPA.

Notice Requirements for a Civ.R. 23(B)(3) Class
& Damages Award under the CSPA

{¶44} Lastly, Ganley argues the trial court's class certification order was procedurally deficient because the trial court proceeded to grant judgment in favor of the class without complying with any of the prejudgment notice requirements set forth in Civ.R. 23(C)(2). Ganley further argues that the CSPA limits damages in class actions to actual damages, and the trial court erred by awarding each class member \$200 in damages for individual violations of the CSPA. The propriety of the trial court's award, however, is outside of the scope of our review on appeal because Ganley has only assigned as error the trial court's certification of the class, not the court's entry of partial judgment on the merits, and the partial judgment on the merits is not a final appealable order.

{¶45} Appellate courts have jurisdiction to review the final orders or judgments of lower courts within their appellate districts. Ohio Constitution, Article IV, Section 3(B)(2). An order must be final before it can be reviewed by an appellate court. "If an order is not final, then an appellate court has no jurisdiction." *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.*, 44 Ohio St.3d 17, 20, 540 N.E.2d 266 (1989).

{¶46} "An order of a court is a final appealable order only if the requirements of both R.C. 2505.02 and, if applicable, Civ.R. 54(B), are met." *State ex rel. Scruggs v. Sadler*, 97 Ohio St.3d 78, 2002-Ohio-5315, 776 N.E.2d 101, ¶ 5, citing *Chef Italiano Corp. v. Kent State Univ.*, 44 Ohio St.3d 86, 541 N.E.2d 64 (1989), syllabus.

{¶47} R.C. 2505.02(B)(4) provides that an order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when that order

grants or denies a provisional remedy and to which both of the following apply:

(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

{¶48} Civ.R. 54(B) requires that a court make an express determination that there is no just reason for delay in order to make appealable an order adjudicating fewer than all the claims or the rights of fewer than all the parties, and must be followed when a case involves multiple claims or multiple parties. *State ex rel. A & D Ltd. Partnership v. Keefe*, 77 Ohio St.3d 50, 56, 671 N.E.2d 13 (1996).

{¶49} The trial court's order giving rise to the instant appeal was both a ruling on class certification and an entry of partial judgment on the merits. Because the partial judgment does not dispose of all claims of all parties to this litigation, we agree with the Felixes' contention that the judgment is not a final appealable order under R.C. 2505.02 and is not subject to review at this time.

Conclusion

{¶50} We are mindful that "due deference must be given to the trial court's decision. A trial court which routinely handles case-management problems is in the best position to analyze the difficulties which can be anticipated in litigation of class actions. * * * A finding of abuse of discretion * * * should be made cautiously." *Marks*, 31 Ohio St.3d at 201, 509 N.E.2d 1249. Here, the trial court conducted a rigorous analysis into whether the prerequisites for class certification under Civ.R. 23 have been satisfied. *See Stammco, L.L.C. v. United Tel. Co. of Ohio*, Slip Opinion No. 2013-Ohio-3019, syllabus (where the Ohio Supreme Court held that

[a]t the certification stage in a class-action lawsuit, a trial court must undertake a rigorous analysis, which may include probing the underlying merits of the plaintiff's claim, but only for the purpose of determining whether the plaintiff has satisfied the prerequisites of Civ.R. 23.

The court presided over the instant case for over eleven years, heard witness testimony and extensive oral argument, and concluded that the Felixes established the requirements to maintain a class action under Civ.R. 23, and the prior notice required to maintain a CSPA class action under R.C. 1345.09(B). The trial court deemed class certification appropriate.

{¶51} Based on the foregoing, we find that the trial court did not abuse its discretion in certifying the class in this case.

{¶52} Accordingly, the sole assignment of error is overruled.

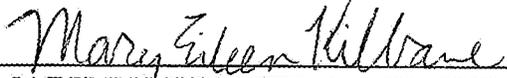
{¶53} Judgment is affirmed.

It is ordered that appellees recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.


MARY EILEEN KILBANE, JUDGE

LARRY A. JONES, SR., P.J., CONCURS;
KENNETH A. ROCCO, J., DISSENTS (WITH SEPARATE DISSENTING
OPINION ATTACHED)

KENNETH A. ROCCO, J., DISSENTING:

{¶54} I respectfully dissent from the majority's disposition of this appeal.

Although I agree that Ganley's inclusion of the subject arbitration provision in its consumer automobile sales agreements could constitute an unfair or deceptive practice giving rise to an individual claim on behalf of the Felixes under the CSPA, in my view, the Felixes failed to establish certain threshold requirements under Civ.R. 23(A) and R.C. 1345.09(B) necessary to maintain a CSPA class action based on these allegations.

Ambiguous Class Definition

{¶55} In this case, the trial court certified a Civ.R. 23(B)(2) and (B)(3) class consisting of

[a]ll consumers of Vehicles from any of the 25 Ganley Companies (see Plaintiff's Chart, Exhibit A, filed August 18, 2003) within the two-year period preceding commencement through the present date (the Class Period), who signed a purchase agreement containing the arbitration clause at suit or one substantially similar thereto.

The majority's opinion summarily concludes, based on what it represents to be "[a] plain reading" of the class definition, that "it would be administratively feasible to determine whether a particular person is a member of the class," and that, "[t]herefore, the identifiable class requirement is satisfied."

{¶56} I disagree. To satisfy Civ.R. 23(A)'s requirement of an identifiable class, the class definition must unambiguously specify the criteria by which to determine whether a particular individual is a member of the class. It is not the role of this court to "formulate the class" for the parties. *Stammco, L.L.C. v. United Tel. Co.*, 125 Ohio St.3d 91, 2010-Ohio-1042, 926 N.E.2d 292, ¶ 12, quoting *Marks v. C.P. Chem. Co., Inc.*, 31 Ohio St.3d 200, 201, 509 N.E.2d 1249 (1987). Although, in many cases, class membership may be readily determined where the term "commencement" is used to identify the class period, where, as here, the trial court certified the class in two different cases "commenced" at two different times, the class action allegations were not added until long after the first action was filed, and one of the defendants, Ganley Management, was not added as a defendant until nearly two years after the commencement of the first action, the meaning of the phrase "within the two-year period preceding commencement" is unclear.⁴ Does the class consist of (1) individuals who signed

⁴As the majority's opinion suggests, this appeal involves two cases with a complex procedural history. The Felixes filed their first action against Ganley Chevrolet, CV-442143, on June 18, 2001, asserting various individual claims relating to the interest rate and financing arrangements applicable to a vehicle the Felixes had purchased from Ganley Chevrolet in March 2001. On November 26, 2001, after Ganley

a purchase agreement within two years of the Felixes' filing of their original complaint in the first action, (2) individuals who signed a purchase agreement within two years of the Felixes' filing of their original complaint in the second action, (3) individuals who signed a purchase agreement within two years of the amendments adding the class allegations, or (4) as it relates to the claims against Ganley Management, individuals who signed a purchase agreement within two years after Ganley Management was added as a defendant?⁵ Because I believe the phrase "within the two-year period preceding commencement" is ambiguous as applied in this case, I do not believe the class definition provides the requisite "means * * * specified at the time of certification to determine whether a particular individual is a member of the class." *Hamilton*, 82 Ohio St.3d at 74, 694 N.E.2d 442; *see also Stammco* at ¶ 11 (trial court abused its discretion in certifying class where class definition was ambiguous, "prevent[ing]

sought to enforce the arbitration provision at issue, the Felixes filed their second action, CV-454238, a declaratory judgment action against Ganley Chevrolet, in which they alleged that Ganley's inclusion of the arbitration provision in their purchase agreement violated the CSPA. Neither of the actions originally included class allegations. Amendments were made to the complaints in both cases, ultimately resulting in the Felixes filing a fourth amended complaint in the first action and a second amended complaint in the second action, both of which included class action allegations seeking declaratory and injunctive relief and/or monetary damages under the CSPA. The amendments to the complaints also affected the named defendants. Ganley Management was added as a defendant to the first action in 2003.

⁵The distinction between Ganley Chevrolet and Ganley Management in this case is not insignificant. For example, with respect to who is liable for the damages awarded, the trial court's order states that Ganley Management "shall be liable in full, while [Ganley Chevrolet] shall be liable only to those class members to whom it sold vehicles."

the class members from being identified without expending more than a reasonable effort”). Accordingly, I would find that the Felixes have failed to satisfy Civ.R. 23(A)’s requirement of an identifiable, unambiguous class.

CSPA’s “Meaningful Notice” Requirement

{¶57} I also take issue with the majority’s determination that Ohio Adm.Code 109:4-3-16(22) and the two prior court decisions from the Attorney General’s public inspection file relied upon by the trial court, *Smith v. Discount Auto Sales*, Lorain C.P. No. 97 CV 120022 (Mar. 19, 1998), PIF No. 10001735, and *Renner v. Derin Acquisition Corp.*, 111 Ohio App.3d 326, 676 N.E.2d 151 (8th Dist.1996), PIF No. 10001587, provided “meaningful notice” to Ganley, as required under R.C. 1345.09(B) and *Marrone v. Philip Morris USA, Inc.*, 110 Ohio St.3d 5, 2006-Ohio-2869, 850 N.E.2d 31, that its inclusion of the subject arbitration provision in its automobile sales agreements constituted an unfair or deceptive practice under the CSPA.

{¶58} Ohio Adm.Code 109:4-3-16(22) provides that

It shall be a deceptive and unfair act or practice for a dealer, manufacturer, advertising association, or advertising group, in connection with the advertisement or 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[.]⁶

⁶I agree with the majority that “[i]t is not entirely clear, following the Ohio Supreme Court’s decision in *Williams v. Spitzer Autoworld Canton, L.L.C.*, 122 Ohio St.3d 546, 2009-Ohio-3554, 913 N.E.2d 410, whether Ohio Adm.Code 109:4-3-16(B)(22)

{¶59} There has been no claim in this case that arbitration was ever the subject of any “statements, representations[,] or promises * * * made prior to obtaining the customer’s signature on the written contract with the dealer,” other than, of course, the arbitration provision itself. To the contrary, the Felixes complained that “no part of the arbitration clause was explained” and that Jeffrey Felix “wasn’t told anything” regarding arbitration before he signed the sales agreement. In other words, the Felixes’ CSPA claim is not premised on allegations that Ganley failed to properly integrate prior “statements, representations[,] or promises” made to induce the Felixes and other class members to purchase vehicles — the conduct regulated by Ohio Adm.Code 109:4-3-16(B)(22) — rather, the Felixes contend that inclusion of the arbitration provision in the sales agreement violated the CSPA because (1) the language of the arbitration provision was ambiguous, confusing, and misleading, (2) the provision failed to provide accurate and complete information about the arbitration process, and (3) as a result, consumers signing the agreement could not have known what being bound to arbitrate any disputes really meant. As such, I would find that Ohio Adm.Code 109:4-3-16(B)(22) is not applicable here

remains a viable basis upon which to base a CSPA violation at least ‘absent proof of fraud, mistake, or other invalidating cause.’ *Id.* at ¶ 20.” Moreover, the trial court’s determination (in considering the impact of *Williams*) that the parol evidence rule “was not an issue” in this case, in my view, further explains why Ohio Adm.Code 109:4-3-16(B)(22) does not apply to the facts here, i.e., because there was no alleged prior statement or representation made regarding arbitration that Ganley failed to integrate into its sales agreements.

and did not provide meaningful notice to Ganley that its inclusion of the subject arbitration provision in its sales agreements was an unfair or deceptive act under the CSPA. *See Williams*, 122 Ohio St.3d 546, 2009-Ohio-3554, 913 N.E.2d 410, at ¶ 19 (“Ohio Adm.Code 109:4-3-16(B)(22) provides that an automobile dealer violates the CSPA if it fails to integrate all oral representations and promises made prior to obtaining the consumer’s signature on the written contract into that contract.”); *Gonzalez v. Spofford*, 8th Dist. Cuyahoga No. 85231, 2005-Ohio-3415, ¶ 26 (dealer violated Ohio Adm.Code 109:4-3-16(B)(22) by failing to integrate promise to assume debt on old plaintiffs’ car, which dealer made to induce plaintiffs to purchase a new vehicle, into the written sales contract); *cf. Shumaker v. Hamilton Chevrolet, Inc.*, 184 Ohio App.3d 326, 2009-Ohio-5263, 920 N.E.2d 1023, ¶ 24-30 (4th Dist.) (trial court erred in finding that dealer violated Ohio Adm.Code 109:4-3-16(B)(22) by omitting a description of exterior paint damage from the written contract where the supplier’s disclosure of damage to the vehicle, without more, would not induce a reasonable consumer to purchase the vehicle).⁷

⁷There may also be an issue as to whether Ohio Adm.Code 109:4-3-16(B)(22) applies to Ganley Management. Ganley Management is not a dealer, but provides management-related services to all the Ganley auto dealerships. Under Ohio Adm.Code 109:4-3-16(B)(22), the prohibited conduct is limited to actions by “dealers, manufacturers, advertising associations, or advertising groups.” Under Ohio Adm.Code 109:4-3-16(A)(1), a “dealer” is “any person engaged in the business of selling, offering for sale or negotiating the sale of five or more motor vehicles during a twelve-month period, commencing with the day of the month in which the first such sale is made, or leasing any motor vehicles, including the officers, agents, salespersons, or

{¶60} Nor would I find that the two decisions relied upon by the trial court from the public inspection file, *Smith, supra*, and *Renner, supra*, provided “meaningful notice” to Ganley that its conduct was unfair and deceptive under *Marrone, supra*, and R.C. 1345.09(B). Although, as the majority points out, these decisions involve the same industry — automobile sales — an analysis of the facts of those cases shows that the conduct at issue in those cases was not “substantially similar” to the conduct at issue here.

{¶61} *Smith* involved a defendant’s failure to honor an express oral warranty that the plaintiff could obtain an unconditional refund if the vehicle at issue did not pass an E-Check or if other mechanical problems arose with the vehicle. Notwithstanding the defendant’s statements to the plaintiff regarding the existence of an express warranty, the defendant marked the contract that the vehicle had been sold “as is” and ultimately refused to honor the warranty in full.

{¶62} In *Renner*, the plaintiff had purchased a vehicle using a GM employee discount certificate she had obtained from her son, a former GM employee. *Renner*, 111 Ohio App.3d at 328-329, 676 N.E.2d 151. At the time she signed the purchase agreement, no one at the dealership told the plaintiff

employees of such a person; or any person licensed as a motor vehicle dealer or salesperson under Chapter 4517. of the Revised Code.” An “authorized agent” is defined in Ohio Adm. Code 109:4-3-16(A)(4) as “any person within the dealership with designated authority to contractually bind the dealership.”

about the requirements for the GM employee discount certificate program, and the dealership had taken no action to determine the validity of the certificate, which it was required to do. *Id.* at 330. After the plaintiff drove away with the vehicle, the dealer learned that the plaintiff's certificate was invalid and would not be honored by GM. *Id.* The dealer then contacted the plaintiff, informed her that GM would not honor the certificate, and demanded that she pay an additional sum for the purchase of the vehicle. *Id.* When the plaintiff refused to pay the additional sum requested, the dealer refused to deliver the vehicle title to her. *Id.* at 330-331.

{¶63} The dealer argued that the validity of the certificate was a condition precedent to the plaintiff obtaining a discounted price on the vehicle. *Id.* at 333. The purchase agreement, however, made no reference to the GM employee discount and did not state that the vehicle sales price was contingent upon meeting requirements for the GM discount. *Id.* at 330, 333. Having failed to reference the plaintiff's redemption of the employee discount certificate in the written sales contract, the court held that the dealer was estopped to assert an oral condition precedent as an excuse for withholding the certificate of title it was otherwise required to deliver. *Id.* at 336.

{¶64} While certain aspects of the conduct in *Smith* or *Renner* may bear some similarity to the conduct at issue in this case, in my view, the defendants' actions in *Smith* and *Renner* are not "substantially similar" to Ganley's alleged

unfair and deceptive conduct in this case, i.e., the inclusion of an incomplete and misleading arbitration provision in its sales agreements.

{¶65} “Substantial similarity” requires a level of “specificity as to the wrongful conduct.” *Gascho v. Global Fitness Holdings, LLC*, 863 F.Supp.2d 677, 695-696 (S.D.Ohio 2012) (applying substantial similarity requirement to various decisions). It means “a similarity not in every detail, but in essential circumstances or conditions.” *Marrone*, 110 Ohio St.3d 5, 2006-Ohio-2869, 850 N.E.2d 31, at ¶ 24. “While this specificity requirement does not mandate identical facts (which would be virtually impossible to show because every situation has distinguishable facts), the level of specificity must go beyond the general prohibitions of the CSPA.” *Gascho* at 695-696; *see also In re Porsche Cars N. Am., Inc. Plastic Coolant Tubes Prods. Liab. Litigation*, 880 F.Supp.2d 801, 870 (S.D.Ohio 2012) (concluding decision in which the defendant placed a vehicle in the stream of commerce that was afflicted with a “multitude of different problems” that “required [the plaintiff] to have the car in for repairs twenty times over a two-year period” was unlike conduct at issue in which defendant allegedly placed a vehicle into the stream of commerce with one defect that required repair on one occasion); *Kline v. Mtge. Elec. Sec. Sys.*, S.D.Ohio No. 3:08cv408, 2010 U.S. Dist. LEXIS 143391 (Dec. 30, 2010) (attorney’s attempts to collect on a stale, defective, and discharged judgment as to an automobile lease was not substantially similar to a mortgage service company’s attempts to

collect attorney fees that could not properly be imposed in connection with a defaulted residential mortgage).

{¶66} Although *Smith*, *Renner*, and this case all arguably involved, in very general terms, a dealer's omission of information from an automobile sales agreement, the type of information omitted, the way in which the information was omitted, and the surrounding circumstances are very different. Both *Smith* and *Renner* involved (along with other conduct that is not applicable here), the failure to integrate specific, material terms to which the parties had allegedly previously agreed into the sales contract. As explained above, this case does not.

{¶67} Further, although in *Renner*, there is some discussion of the dealer's obligation "to integrate in[to] the final contract 'all material statements, representations, or promises,'" including any agreed terms relating to the redemption of the employee discount certificate, the CSPA violations at issue centered primarily on the dealer's attempt to increase the purchase price and failure to deliver the certificate of title for the vehicle after the plaintiff had refused to pay the increased price demanded by the dealer. In *Smith*, the CSPA violations centered around the defendant's failure to honor the terms of the express warranty that had been given to the plaintiff. Because, in my view, *Smith* and *Renner* do not "share the essential characteristics or conditions" alleged in this case, I do not agree with the majority's conclusion that they

provided “meaningful notice” to Ganley that its actions constituted a deceptive act or practice under R.C. 1345.09(B).

CSPA Limitation of Damages

{¶68} Further, even if *Smith, Renner*, or Ohio Adm.Code 109:4-3-16(B)(22), provided Ganley with the meaningful notice required by R.C. 1345.09(B), I would still find that the trial court abused its discretion in certifying the putative class as a Civ.R. 23(B)(3) damages class under the CSPA because the class is overly broad and includes individuals who sustained no actual damages as a result of the conduct at issue.

{¶69} Where classwide relief is sought for a violation of the CSPA, the recoverable damages are limited to actual damages. R.C. 1345.09(B); *Washington v. Spitzer Mgt.*, 8th Dist. Cuyahoga No. 81612, 2003-Ohio-1735, ¶ 32 (“CSPA limits the damages available in class actions to actual damages”); *Konarzewski v. Ganley, Inc.*, 8th Dist. Cuyahoga No. 92623, 2009-Ohio-5827, ¶ 46 (“class action plaintiffs must prove actual damages under the CSPA”). A showing of actual damages is therefore required before a CSPA class seeking the recovery of damages may be properly certified. *See Searles v. Germain Ford of Columbus, L.L.C.*, 10th Dist. Franklin No. 08AP-728, 2009-Ohio-1323, ¶ 22 (“The fact that statutory damages are not available in a class action indicates proof of actual damages is required before certification of an R.C. 1345.09 class action is proper.”). Only those individuals who sustained actual damages as a result of

an alleged CSPA violation may properly be included within a Civ.R. 23(B)(3) damages class. *See, e.g., Konarzewski*, 2009-Ohio-5827 at ¶ 47-48 (observing that to comply with R.C. 1345.09(B), Civ.R. 23(B)(3) class would “need to be narrowed” to include only those individuals who sustained actual damages).

{¶70} Although I can certainly envision scenarios in which customers may have sustained actual damages as a result of Ganley’s inclusion of the arbitration provision in their sales agreements, e.g., attorney fees incurred in opposing efforts to enforce the arbitration provision (as the Felixes have incurred in this case), damages resulting from a customer’s decision to forgo recourse it might otherwise have pursued due to confusion regarding what arbitration of the dispute under the sales agreement entailed, I can also envision scenarios in which customers sustained no actual damages at all, such as where a customer had no dispute with Ganley. There is certainly nothing in the record that suggests that all Ganley customers sustained actual damages as a result of Ganley’s use of the arbitration provision, such that a class of “[a]ll consumers of Vehicles from any of the 25 Ganley Companies * * * who signed a purchase agreement containing the arbitration clause at suit or one substantially similar thereto” could be properly certified as a Civ.R. 23(B)(3) damages class under the CSPA.

{¶71} The majority does not address this issue. Instead, the majority concludes that because the trial court’s “partial judgment on the merits” is not

a final appealable order and “not subject to review at this time,” the court need not consider the CSPA’s limitation on damages or whether the trial court erred in “exercis[ing] its discretion” and awarding each class member \$200 in damages for violations of the CSPA.

{¶72} However, the CSPA’s damages limitation impacts not only the damages that may ultimately be recovered by a properly certified class but whether a putative class may be properly certified as a Civ.R. 23(B)(3) CSPA class in the first instance. See, e.g., *Searles*, 2009-Ohio-1323 at ¶ 22; *Konarzewski*, 2009-Ohio-5827, at ¶ 47-48. Because the Civ.R. 23(B)(3) class certified by the trial court includes individuals who sustained no actual damages, I would find that the trial court abused its discretion in certifying the class under the CSPA.⁸

⁸The trial court’s certification of the Civ.R. 23(B)(3) damages class under the CSPA (and its classwide damages award) was based on the theory that the trial court could, in “its discretion,” award each class member \$200 in damages for violations of the CSPA because class members “were denied material information concerning their recourse * * * against the vehicle merchant, should they have the need for recourse.” However, no provision exists for the recovery of such “discretionary” damages in a CSPA class action. In support of its damages theory, the trial court cites *State v. Rose Chevrolet, Inc.*, 12th Dist. Butler No. CA910120214, 1993 Ohio App. LEXIS 3281 (June 28, 1993), involving a dealer’s practice of selling used rental car vehicles as “factory official” vehicles. The trial court determined that the practice was an unfair and deceptive act under the CSPA and, based on testimony from a manager of a used car dealership regarding the difference in value between a used rental car and a “factory official” car, awarded each class member who had purchased such a vehicle \$500 in damages. *Id.* at *2, *4. The appellate court affirmed. *Id.* at *6. *Rose Chevrolet*, unlike this case, involved an award of actual damages to class members based on the “benefit of the bargain” theory, i.e., “the difference between the value of property as it was represented to be and its actual value at the time it was received or purchased.” *Id.* at *5. It does not support the trial court’s damages theory in this case.

Prejudgment Notice Requirement for Civ.R. 23(B)(3) Class Actions

{¶73} In my view, the trial court's class certification order is also procedurally deficient. I believe that the trial court, in purporting to adjudicate the merits and to award damages as part of its class certification order — without providing the prejudgment notice required under Civ.R. 23(C)(2) — is proceeding on an improper procedural course. See *Stammco, L.L.C. v. United Tel. Co. of Ohio*, Slip Opinion No. 2012-0169, 2013-Ohio-3019, ¶ 33 (July 16, 2013) (“[T]he office of a Rule 23(b)(3) certification ruling is not to adjudicate the case; rather, it is to select the ‘metho[d]’ best suited to adjudication of the controversy ‘fairly and efficiently.’”), quoting *Amgen v. Connecticut Retirement Plans & Trust Funds*, ___ U.S. ___, 133 S.Ct. 1184, 1191, 185 L.Ed.2d 308 (2013); *Cullen*, 2011-Ohio-6621 at ¶ 55 (statement in trial court's findings of fact and conclusions of law in class certification order that went “to the heart of the

The Felixes contend that the trial court's “discretionary damages” theory is nothing more than a “creative approach” to damages, and that such approaches to damages have been expressly authorized in CSPA cases. In the cases cited by the Felixes in support of this proposition, however, there was either a specific statute governing the amount of damages to be awarded, *Celebrezze v. Hughes*, 18 Ohio St.3d 71, 479 N.E.2d 886 (1985) (odometer fraud), or a clear method by which actual damages were calculated, supported by the evidence in the record. See *Rose Chevrolet, supra*; *Wiseman v. Kirkman*, 2d Dist. Darke No. 1575, 2002-Ohio-5384. In this case, there was neither. Accordingly, I would find that the trial court abused its discretion in determining that \$200 in “discretionary damages” could be awarded to all class members based on Ganley's violation of the CSPA and in certifying a Civ.R. 23(B)(3) class under the CSPA based on this “creative” damages theory which is contrary to applicable law.

merits of the case” and was “possibly outcome determinative” was “inappropriate” at the class certification stage).

{¶74} Civ.R. 23 requires that prejudgment notice be provided to members of a (B)(3) class. Civ.R. 23(C)(2) provides:

In any class action maintained under subdivision (B)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (a) the court will exclude him from the class if he so requests by a specified date; (b) the judgment, whether favorable or not, will include all members who do not request exclusion; and (c) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

It is clear from the language of the rule that the notice required by Civ.R. 23(C)(2) is to be provided before judgment is entered on any claims of a Civ.R. 23(B)(3) class.

{¶75} Civ.R. 23(C) contains significant procedural protections required for due process. See *Dukes*, 131 S.Ct. at 2558-2559, 180 L.Ed.2d 374, citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-812, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985). Without the requisite prejudgment notice, due process may be impaired.

Conclusion

{¶76} Like the majority, I am mindful that “due deference must be given” to a trial court’s decision regarding class certification. *Marks*, 31 Ohio St.3d at 201, 509 N.E.2d 1249. However, a trial court’s discretion in deciding whether to certify a class must be exercised within the framework of Civ.R. 23, and in the

case of a putative class action under the CSPA, the requirements of R.C. 1345.09(B). *Hamilton*, 82 Ohio St.3d at 70, 694 N.E.2d 442; R.C. 1345.09(B). It is our job to ensure that the trial court “carefully appl[ies] the class action requirements” and conducts a “rigorous analysis” into whether the prerequisites for class certification have been satisfied. *Hamilton* at 70. Where classwide relief is sought for an alleged violation of the CSPA, the requirements of R.C. 1345.09(B), as well as the requirements of Civ.R. 23, must be met.

{¶77} “A determination by a trial court regarding class certification that is clearly outside the boundaries established by Civ.R. 23, or that suggests that the trial court did not conduct a rigorous analysis into whether or not the prerequisites of Civ.R. 23 are satisfied, will constitute an abuse of discretion.” *Mozingo v. 2007 Gaslight Ohio, LLC*, 9th Dist. Summit Nos. 26164 and 26172, 2012-Ohio-5157, ¶ 8, quoting *Hill v. Moneytree of Ohio, Inc.*, 9th Dist. Lorain No. 08CA009410, 2009-Ohio-4614, ¶ 9. Likewise, “[w]here the trial court completely misconstrues the letter and spirit of the law, it is clear that the court has been unreasonable and has abused its discretion.” *Howland v. Purdue Pharma L.P.*, 104 Ohio St.3d 584, 2004-Ohio-6552, 821 N.E.2d 141, ¶ 26, quoting *Warner v. Waste Mgt.*, 36 Ohio St.3d 91, 99, 521 N.E.2d 1091 (1988), fn. 10.

{¶78} Based upon my analysis, for the reasons set forth above, I believe those circumstances exist here. I do not believe that prerequisites to class certification under Civ.R. 23(A) and R.C. 1345.09(B) were met in this case. I

would, therefore, find that the trial court abused its discretion in certifying the Civ.R. 23(B)(2) and (B)(3) CSPA class in this case and would reverse the trial court's order granting class certification.

EXHIBIT C

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Andrea Rocco, Clerk of Courts

JEFFREY FELIX, ET AL.

Appellee

COA NO.
98985

LOWER COURT NO.
CP CV-442143
CP CV-454238

COMMON PLEAS COURT

-vs-

GANLEY CHEVROLET, INC., ET AL.

Appellant

MOTION NO. 467752

Date 09/16/13

Journal Entry

Motion by Appellants for reconsideration is denied.

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ALL PARTIES.-COSTS TAKEN

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CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By MAR Deputy

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Presiding Judge LARRY A. JONES, SR.,
Concurs

Judge KENNETH A. ROCCO, Dissents

Mary Eileen Kilbane
MARY EILEEN KILBANE
Judge

EXHIBIT D

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Andrea Rocco, Clerk of Courts

JEFFREY FELIX, ET AL.

Appellee

COA NO.
98985

LOWER COURT NO.
CP CV-442143
CP CV-454238

COMMON PLEAS COURT

-vs-

GANLEY CHEVROLET, INC., ET AL.

Appellant

MOTION NO. 467753

Date 09/24/13

Journal Entry

Application by Appellants for en banc review is denied. See separate journal entry of this same date.

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CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By [Signature] Deputy

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ALL PARTIES--COSTS TAKEN

[Signature]
MELODY J. STEWART
Administrative Judge



Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Andrea Rocco, Clerk of Courts

Jeffrey Felix, et al.

Appellees

COA NO.
98985

LOWER COURT NOS.
CP CV-442143
CV-454238

-vs-

COMMON PLEAS COURT

Ganley Chevrolet, Inc., et al.

Appellants

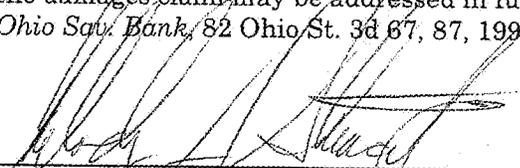
MOTION NO. 467753

Date 09/24/2013

Journal Entry

This matter is before the court on appellants' application for en banc consideration. Pursuant to App.R. 26, Loc.App.R. 26, and *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672, we are obligated to resolve conflicts between two or more decisions of this court on any issue that is dispositive of the case in which the application is filed.

We find no conflict between the panel majority's decision in this case and *Barber v. Meister Protection Services, Inc.*, 8th Dist. Cuyahoga No. 81553, 2003-Ohio-1520, ¶ 33-34; *Maestle v. Best Buy Co.*, 197 Ohio App.3d 248, 2011-Ohio-5833, ¶ 23; *Hoang v. E*Trade Group, Inc.*, 151 Ohio App.3d 363, 2003-Ohio-301; *Repede v. Nunes*, 8th Dist. Cuyahoga No. 87277 and 87469, 2006-Ohio-4117; and *Washington v. Spitzer Mgmt., Inc.*, 8th Dist. Cuyahoga No. 81612, 2003-Ohio-1735, ¶ 33. The defined class was injured by the inclusion of a deceptive contract provision, and may be entitled to declaratory and injunctive relief. The question whether the class should be limited with respect to the damages claim may be addressed in future proceedings. See Civ.R. 23(C)(1) and (4); *Hamilton v. Ohio Sav. Bank*, 82 Ohio St. 3d 67, 87, 1998-Ohio-365, 694 N.E.2d 442.


MELODY J. STEWART, ADMINISTRATIVE JUDGE

Concurring:

PATRICIA A. BLACKMON, J.,
MARY J. BOYLE, J.,
FRANK D. CELEBREZZE, JR., J.,
LARRY A. JONES, J.,
KATHLEEN ANN KEOUGH, J.,
MARY EILEEN KILBANE, J.,
TIM MCCORMACK, J., and
KENNETH A. ROCCO, J.

Dissenting:

SEAN C. GALLAGHER, J.
EILEEN T. GALLAGHER, J.,

EILEEN A. GALLAGHER, J., abstains

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SEP 24 2013

CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By  Deputy

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