

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 Appeals Eighth Appellate District  
) Case No. CA 12 098985  
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AMICI MEMORANDUM OF  
THE OHIO AUTOMOBILE DEALERS ASSOCIATION AND GREATER CLEVELAND  
AUTOMOBILE DEALERS ASSOCIATION  
IN SUPPORT OF JURISDICTION

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## MEMORANDUM IN SUPPORT OF JURISDICTION

### **I. STATEMENT OF AMICI INTEREST**

The Ohio Automobile Dealers Association (“OADA”) represents approximately 830 franchised automobile, truck, motorcycle, and recreational vehicle dealers throughout the state. OADA has served the franchised motor vehicle dealer industry since 1932, promoting the common interests of the retail automotive industry. Similarly, the Greater Cleveland Automobile Dealers’ Association (“GCADA”) represents over 250 new motor vehicle dealerships in a 21-county region of northern Ohio, including franchised new-car and truck, motorcycle and recreational vehicle dealers. A vast majority of dealerships in Ohio are family-owned and have been in business for multiple generations.

These dealerships contribute enormously to Ohio's economy. In 2012, franchised new vehicle dealerships generated \$34.4 billion in sales revenue for Ohio, accounting for approximately 24.8% of Ohio’s total retail sales. They collect approximately \$1.27 billion in sales tax revenue every year. Ohio dealerships employ nearly 50,000 employees and pay over \$2.2 billion in wages to their employees on an annual basis, resulting in \$394 million in Ohio income taxes. In short, automobile dealers are a vital cog in Ohio’s overall economy.

### **II. WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST**

Is a consumer actually damaged if that consumer enters into a transaction that “unconscionably” requires any dispute to be resolved by arbitration, even if the consumer never has a dispute with the retailer that needs to be resolved, by arbitration or otherwise?

While Ohio’s Consumer Sales Practices Act imposes statutory damages of \$200 per violation, when a case is brought as a class action, only actual damages, and not statutory damages, may be awarded. R.C. 1345.09(B). Here, after the trial court deemed the arbitration clause utilized by Ganley to be a violation of the CSPA, it then took the surprising step of

awarding \$200 to every customer that bought a vehicle from any Ganley dealership in the preceding two years – even those consumers who never had a dispute with Ganley, and therefore were never impacted or damaged in any way by the arbitration clause at issue.

The consequences of this decision, if left intact by this Court, are sweeping. Motor vehicle dealers, like many retailers, use basic transaction documents that are uniform for essentially all of their sales. Under the decision of the Court of Appeals, if a retailer makes one mistake on such a form, and that form is then used with customer after customer, even if the mistake has absolutely no bearing on the transactions with those customers, each customer is entitled to \$200 in damages. The amount of damages that can and will therefore be imposed on Ohio businesses in such cases can absolutely cripple most businesses – not for a practice of unlawful dealings with consumers or a nefarious scheme to broadly deceive customers – but for a single mistake that is repeated endlessly because the retailer uses a standard form that contains the alleged mistake.

The General Assembly had the wisdom to permit statutory damages in single-plaintiff actions, where such damages can serve an important deterrent purpose, but not in class action cases, where they can unfairly devastate a small business, such as a motor vehicle dealership, even when consumers are not actually harmed in any way. The trial court and the court of appeals ignored this distinction, and, if left to stand, the court of appeals decision puts small and medium-sized businesses across the State at risk that one relatively harmless error in a form document can put them out of business. For these reasons, this case presents an issue of great public interest.

### **III. STATEMENT OF THE CASE AND FACTS**

Plaintiffs brought this class action suit after purchasing a vehicle from Ganley. A dispute arose between Plaintiffs and the dealership over the interest rate to be paid on the loan for the

vehicle. Plaintiffs, who had signed a Purchase Agreement that contained an arbitration provision, argued that the arbitration clause violated the CSPA. The lower courts certified a class consisting of all consumers who purchased a vehicle from any Ganley dealership with the same or a “substantially similar” arbitration clause within an ill-defined two-year period, and proceeded to award “discretionary damages” of \$200 to each class member.

#### IV. AMICI'S 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.

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.

Amici will address these two propositions of law together, as they are inextricably intertwined and, taken together, these two propositions of law lay out *Amici's* primary concerns with the decisions below. The trial court certified a class, and awarded damages to a class, in a case where only actual damages can be awarded, and where no class members (other than the named plaintiffs) demonstrated any actual damages whatsoever. And, of course, because the vast majority of consumers had no dispute with any Ganley entity, the vast majority of the certified class who received \$200 damage awards suffered no actual damage at all – in direct contravention of R.C 1345.09(B).

It is true that class actions are, and should be, regularly certified where the *fact* of damages is common to all class members, though the *amount* of damages may require individualized assessments. *Ojalvo v. Board of Trustees*, 12 Ohio St. 3d 230, 232 (1984) (“a trial court should not dispose of a class certification solely on the basis of disparate damages”). But

this Court and courts across the country have universally held that class actions should not be certified where, as here, individualized assessments are required to determine *whether* a class member was damaged, rather than in what amount. *Stammco, L.L.C. v. United Tel. Co. of Ohio*, 136 Ohio St. 3d 231, 243 (2013) (“If 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.”); *Gonzales v. Comcast Corp.*, 2012 WL 10621, \*18 (E.D. Cal. 2012) (“While determining that the amount of damages does not defeat the predominance inquiry, a proposed class action requiring the court to determine individualized fact of damages does not meet the predominance standards of Rule 23(b)(3).”); *Brown v. Am. Honda*, 522 F.3d 6, 28 (1st Cir. 2008) (“Establishing liability, however, still requires showing that class members were injured at the consumer level.”); *In re Live Antitrust Litigation*, 247 F.R.D. 98 (C.D. Cal. 2007) (recognizing the distinction between demonstrating the fact of damages and the amount of damages, and determining that while the latter does not preclude class certification, the former does); *Little Caesar Enters. v. Smith*, 1995 U.S. Dist. LEXIS 20051, 19-20 (E.D. Mich. Apr. 19, 1995) (“Nor is the fact that there will be uncertainty later in the individual measure of damages fatal to common proof of the fact of damages so long as it can be clearly shown that the illegal behavior of defendants did cause some damage in fact to each-class member.”); *Martino v. McDonald’s System, Inc.*, 86 F.R.D. 145, 147 (N.D. Ill. 1980) (“The fact of damage is distinct from the issue of actual damages. Fact of damages pertains to the existence of injury, as a predicate to liability; actual damages involve the quantum of injury, and relates to the appropriate measure of individual relief. . . . Where proof of fact of damage requires evidence concerning individual class members, the common questions of fact become subordinate to the individual issues, thereby rendering class certification problematic.”).

While the above cases leave no doubt that the entire certified class must have suffered damages for a class action suit to be proper, that result is all the more clear in this case because the CSPA states that statutory damages are not available in class action cases. R.C. 1345.09(B); *Searles v. Germain Ford of Columbus, L.L.C.*, 2009-Ohio-1323, ¶ 22 (10<sup>th</sup> Dist. 2009). The question presented by this case might be meaningfully different if the CSPA's \$200 in statutory damages could be awarded on a class-wide basis. But it cannot. Thus, the certification of a class of plaintiffs in a CSPA claim that did not suffer actual damages was entirely improper, as was, of course, the out-of-thin-air class-wide award of "discretionary damages." There is no such thing.

The trial court certified a class consisting primarily of individuals who suffered no actual damages as a result of the CSPA violation found to have been committed by Ganley. This decision is absolutely contrary to law, and must be reversed.

V. **CONCLUSION**

The OADA and GCADA respectfully suggests that this Court should exercise jurisdiction over this appeal to clarify that certification of a class requires a class in which all members suffered damages.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing *Amici* Memorandum in Support of Jurisdiction was served on the following counsel, by ordinary U.S. mail, postage prepaid, this 8th day of November, 2013:

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