

ORIGINAL

IN THE SUPREME COURT OF OHIO

JEFFREY FELIX, <i>et al.</i> ,	:	Sup. Ct. Case No. 13-1746
	:	
Plaintiff - Appellees,	:	Appeal from the Cuyahoga
	:	County Court of Appeals,
v.	:	Eighth Appellate District,
	:	Case No. CA 12 098985
GANLEY CHEVROLET, INC., <i>et al.</i> ,	:	
	:	
Defendants - Appellants.	:	

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MEMORANDUM OF AMICUS CURIAE  
OHIO ASSOCIATION OF CIVIL TRIAL ATTORNEYS  
IN SUPPORT OF APPELLANTS

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Drew H. Campbell (0047197)  
(Counsel of Record)  
Ali I. Haque (0087860)  
Kara H. Herrnstein (0088520)  
BRICKER & ECKLER LLP  
100 South Third Street  
Columbus, Ohio 43215-4291  
Phone: (614) 227-2300  
Fax: (614) 227-2390  
E-mail: dcampbell@bricker.com  
ahaque@bricker.com  
kherrnstein@bricker.com

*Counsel for Amicus Curiae,  
Ohio Association of Civil Trial Attorneys*

Joseph A. Castrodale (0018494)  
(Counsel of Record)  
David D. Yeagley (0042433)  
Ulmer & Berne, LLP  
Skylight Office Tower  
1660 West Second Street, Suite 1100  
Cleveland, OH 44113  
Phone: (216) 583-7000  
Fax: (216) 583-7001  
E-mail: jcastrodale@ulmer.com  
dyeagley@ulmer.com

A. Steven Dever (0024982)  
A. Steven Dever Co., LPA  
13363 Madison Avenue  
Lakewood, Ohio 44107  
Phone: (216) 228-1166  
E-mail: astevendeve@aol.com

*Counsel for Defendants-Appellants,  
Ganley Chevrolet, et al.*

FILED  
APR 14 2014  
CLERK OF COURT  
SUPREME COURT OF OHIO

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

*Counsel for the Plaintiffs-Appellees*

**TABLE OF CONTENTS**

	<u>Page</u>
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES .....	ii
STATEMENT OF INTEREST OF AMICI CURIAE.....	1
INTRODUCTION .....	2
STATEMENT OF FACTS .....	4
LAW AND ARGUMENT .....	4
<i>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.</i> .....	4
<i>Proposition of Law No. 2: In a class action brought under the Ohio Consumer Sales Practices Act, R.C. 1345.09(B) requires consumers to have sustained actual damages as a result of the challenged conduct.</i> .....	6
CONCLUSION.....	8
CERTIFICATE OF SERVICE .....	10

**TABLE OF AUTHORITIES**

	<u>Page</u>
<b><u>Cases</u></b>	
<i>Comcast Corp. v. Behrend</i> , 133 S. Ct. 1426 (2013) .....	5
<i>Cullen v. State Farm Mut. Auto. Ins. Co.</i> , Slip. Op. No. 2013-Ohio-4733 .....	3, 9
<i>Felix v. Ganley Chevrolet, Inc.</i> , 2013-Ohio-3523 (8th Dist.) .....	2, 4, 5, 6
<i>Konarzewski v. Ganley, Inc.</i> , 2009-Ohio-5827 (8th Dist.) .....	6, 7
<i>Searles v. Germain Ford of Columbus, L.L.C.</i> , 2009-Ohio-1323 (10th Dist.) .....	7, 8
<i>Stammco, L.L.C. v. United Tel. Co. of Ohio</i> , 136 Ohio St. 3d 231, 2013-Ohio-3019, 994 N.E.2d 408 .....	passim
<i>Stoneback v. Artsquest</i> , 2013 U.S. Dist. LEXIS 86457 (E.D. Pa. June 20, 2013) .....	5
<i>Washington v. Spitzer Mgt</i> , 2003-Ohio-1735 (8th Dist.) .....	6
<b><u>Statutes</u></b>	
R.C. 1345.09(B) .....	2, 6, 7
<b><u>Rules</u></b>	
Civ.R. 23 .....	passim
Civ.R. 23(B) .....	8
Civ.R. 23(B)(2) .....	3
Civ.R. 23(B)(3) .....	3, 7

## STATEMENT OF INTEREST OF AMICI CURIAE

The Ohio Association of Civil Trial Attorneys (“OACTA”) is an organization comprised of attorneys, corporate executives, and managers, all devoted to the defense of civil lawsuits and the management of claims against individuals, corporations, and government entities. For nearly half a century, OACTA’s mission has been to provide a forum where dedicated professionals can work together to promote and improve the administration of justice in Ohio.

OACTA members, large and small, support a balanced civil justice system that will not only award fair compensation to injured persons, but also impose sufficient safeguards so that defendants are not unjustly penalized and plaintiffs are not unjustly enriched. OACTA members strongly support stability and predictability in the civil justice system. Ohio’s businesses and professionals must know what risks they assume as they drive commerce in Ohio.

In furtherance of this mission, OACTA often participates as amicus curiae in cases addressing legal principles that impact its members, their clients, and the fair and efficient administration of justice in Ohio. This is such a case.

OACTA believes that the judgment of the Eighth District in this case, if allowed to stand, would negatively impact their members and the public policy of this State. The Eighth District departed from the existing Ohio Consumer Sales Practices Act (“OCSPA”) and Civil Rule 23 jurisprudence, making it easier for plaintiffs to pursue damages awards in class action cases brought under the OCSPA without any showing that consumers included in the class suffered actual harm and actual damages as a requirement for class certification. In so doing, the Eighth District has created confusion in an already complex area of law. As a result, Ohio litigants will have difficulty ascertaining the status of the law, or trust that it will be predictably applied. For these reasons and as set forth more fully below, OACTA urges the Court to overturn the Eighth District.

## INTRODUCTION

This Court should reverse the Eighth District's decision in *Felix v. Ganley Chevrolet, Inc.*, 2013-Ohio-3523 (8th Dist.). If allowed to stand, the decision has the potential to: (1) create an entirely new category of class action litigation under the OCSPA, which the current statutory framework bars; and (2) increase all class action litigation in Ohio by evading the requirement that a rigorous analysis must be performed to ensure that the elements of Civil Rule 23 and the requirements of R.C. 1345.09(B) are satisfied prior to class certification, ignoring this Court's mandate in *Stammco, L.L.C. v. United Tel. Co. of Ohio*, 136 Ohio St. 3d 231, 2013-Ohio-3019, 994 N.E.2d 408. The Eighth District's decision also creates confusion given that it purports to, but does not, follow this Court's precedent in OCSPA and class action cases.

Specifically, to maintain a class action, the OCSPA requires a litigant to show *actual* damages, as opposed to *statutory or discretionary* damages. At issue in this case is the proper interpretation and application of R.C. 1345.09(B), which requires showing actual damages *prior* to class certification. In *Stammco*, this Court held that certification of a class was improper if the class included a "great number of members who for some reason could not have been harmed by defendant's allegedly unlawful conduct." And in the OCSPA class action context, *Stammco's* requirement of "harm" is coexistent with R.C. 1345.09(B)'s requirement of "actual damages."

In this case, the trial court invalidated the named plaintiffs' arbitration agreement, which it then used as a basis to certify the class of all customers whose purchase contracts merely included the arbitration agreement, but where those customers overwhelmingly did not have any dispute that implicated or involved the arbitration agreement. Then, despite Ohio law requiring litigants to show actual damages to certify a class under the OCSPA, the trial court awarded \$200 in "discretionary damages" for each class member simply due to the inclusion of the arbitration agreements in their purchase contracts. The Eighth District then refused to consider

whether class members suffered any actual damages because of the inclusion of the arbitration agreement. As a result, there was no finding that any class member suffered any actual damages. Thus, as certified, the class includes those who never had a dispute with Appellants that implicated the arbitration agreement.

By affirming class certification, the Eighth District has increased the scope of class actions under the OCSA to include classes consisting of members who can only show statutory or discretionary damages, ignoring *Stammco*'s requirement of class-wide "harm" and the OCSA's requirement that litigants prove actual damages prior to class certification.

In addition, the Eighth District created a conflict among Ohio courts by contravening established case law in at least two appellate districts, including the Eighth District itself, which have found that litigants must prove actual damages prior to class certification under the OCSA.

Importantly, by affirming a class that includes members who suffered no actual harm, the Eighth District decision ignores this Court's recent decision in *Stammco*, which requires a court to conduct a rigorous analysis to ensure all Civil Rule 23 requirements are met prior to class certification, including ensuring that the class does not include members who suffered no actual harm.

The Court's most recent decision in *Cullen v. State Farm Mut. Auto. Ins. Co.*, Slip. Op. No. 2013-Ohio-4733 does not resolve the issues in this case. Although the Court provided guidance with respect to Civil Rule 23(B)(2) and 23(B)(3), it did not address the scope of class actions under the OCSA and did not address the issue of improperly certifying a class under Civil Rule 23 that contains members who suffered no harm.

For all of these reasons, Amicus Curiae join Appellants in asking the Court to reverse the Eighth Appellate District.

### **STATEMENT OF FACTS**

Amicus Curiae defer to the Statement of Facts presented by Appellants.

### **LAW AND ARGUMENT**

**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 decision below upheld certification of a class that includes *all* customers who purchased a vehicle and signed a purchase agreement that included an arbitration agreement, regardless of whether the class members had a dispute that even implicated the arbitration agreement. *Felix*, 2013-Ohio-3523 at ¶ 18. The class definition thus included those who suffered no harm and no actual damages.

In affirming class certification, the Eighth District relied almost entirely on pre-*Stammco* case law, mentioning the *Stammco* decision only once at paragraph 50. *Id.* at ¶ 50. In doing so, the Eighth District ignored this Court’s mandate to conduct a “rigorous analysis” to ensure that the requirements of Civil Rule 23 are met, including whether class members have suffered actual harm. *Stammco*, 136 Ohio St. 3d 231, 232, 2013-Ohio-3019 at ¶ 3.

Under Civil Rule 23, a plaintiff must show that an identifiable and unambiguous class exists. *Id.* at ¶ 19. The Eighth District held that the class was identifiable under Civil Rule 23 because it was “administratively feasible to determine whether a particular person is a member of the class” by reason of the inclusion of the arbitration agreement, even though the class definition included customers who had no dispute and, therefore, suffered no harm as a result of the mere inclusion of the arbitration agreement in their purchase contracts. *Felix*, 2013-Ohio-

3523 at ¶¶ 17, 19. But this analysis is contrary to the requirement that a class be identifiable and not overbroad, since a court would be required to parse through all customers on a one-by-one basis to determine who, if anyone, might have suffered actual harm.

In *Stammco*, the proposed class definition included *all customers* whose phone bills included third-party charges for which the defendant telecom company had no prior authorization, regardless of whether the charges were proper. *Stammco* at ¶ 56.

This Court struck down class certification in *Stammco*, holding that if a class definition includes members who were not harmed by the alleged unlawful conduct, then the class definition is too broad to allow class certification. *Id.* at ¶¶ 53, 56 (“Under the proposed amended class, every person who was billed a third-party charge for which [the defendant telecom company] had no prior authorization is now a class member even if the third-party charge was proper. Therefore, the proposed amended class is overbroad and is not a proper class.”). As a result, *Stammco* expressly requires Ohio’s lower courts to consider at the class certification stage whether the class is comprised of individuals who suffered harm as a result of the allegedly unlawful conduct. *Id.*

Moreover, recent Supreme Court of the United States precedent indicates that plaintiffs must sufficiently show class-wide damages to satisfy the rigorous analysis necessary to sustain a class action. *See Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013); *see also Stoneback v. Artsquest*, 2013 U.S. Dist. LEXIS 86457, \*49 (E.D. Pa. June 20, 2013) (The district court found that plaintiffs’ inability to show actual damages was inconsistent with *Comcast*’s requirement “that damages [be] susceptible of measurement across the entire class.”).

Here, the alleged unlawful conduct was inclusion of the arbitration agreement in the purchase agreement. *Felix* at ¶ 6. The trial court established that the named plaintiffs had a

dispute that implicated the arbitration agreement. But the court failed to make a similar determination regarding other class members, thus including in the class definition *all customers* who had a purchase contract that included the arbitration agreement at issue. *Id.* at ¶¶ 6, 7.

Therefore, just like *Stammco*, the class definition here was too broad because it included anyone who had the arbitration agreement within their purchase contract, regardless of whether they had a dispute that implicated the arbitration agreement. *Id.*

If allowed to stand, the Eighth District's decision creates an anomaly under Ohio law: although this Court held in *Stammco* that a trial court must consider the issue of actual harm under Civil Rule 23 at the class certification level, the Eighth District essentially held that such an inquiry is outside the scope of Civil Rule 23. *See Stammco* at ¶ 53, 56.

This holding creates uncertainty for Ohio businesses, litigants, and lower courts with respect to the scope of potential classes certified in class action litigation. Accordingly, Amicus Curiae respectfully request the Court to clarify this point of law and overturn the Eighth District's decision.

**Proposition of Law No. 2: In a class action brought under the Ohio Consumer Sales Practices Act, R.C. 1345.09(B) requires consumers to have sustained actual damages as a result of the challenged conduct.**

Where plaintiffs seek class-wide damages for an OCSPA violation, their recovery is limited to actual damages. *Felix* at ¶ 69 (Rocco, J., dissenting) (citing R.C. 1345.09(B)); *Washington v. Spitzer Mgt*, 2003-Ohio-1735, ¶ 32 (8th Dist.) (“CSPA limits the damages available in class actions to actual damages”); *Konarzewski v. Ganley, Inc.*, 2009-Ohio-5827, ¶ 46 (8th Dist.) (“class action plaintiffs must prove actual damages under the CSPA”).

As a result, *prior* to class certification of a class under the OCSPA, plaintiffs must show proof of actual damages, and “[o]nly those individuals who sustained actual damages as a result of an alleged CSPA violation may properly be included within” a damages class. *Id.* at ¶ 69

(citing *Searles v. Germain Ford of Columbus, L.L.C.*, 2009-Ohio-1323, ¶ 22 (10th Dist.) (“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.”)); *Konarzewski v. Ganley, Inc.*, 2009-Ohio-5827, ¶¶ 47-48 (8th Dist.) (observing that to comply with R.C. 1345.09(B), Civ.R. 23(B)(3) a class would “need to be narrowed” to include only those individuals who sustained actual damages).

Here, the trial court found the arbitration agreement at issue invalid as to the named plaintiffs, certified a class of all customers whose purchase contracts contained the arbitration agreement, and awarded \$200 in “discretionary damages” to each class member. *Id.* at ¶¶ 4-6. But as explained by the dissent, this class definition includes both those who sustained actual damages (such as the named plaintiffs, for example, who had to litigate the arbitration agreement deemed invalid) and those who sustained no damages at all (such as customers who never even had a dispute with defendants). *Id.* at ¶ 70 (Rocco, J., dissenting). Further, the OCSPA does not permit courts to award “discretionary damages” in class actions—only actual damages. *Id.* at ¶ 72, n.8 (Rocco, J., dissenting) (“no provision exists for the recovery of such ‘discretionary’ damages in a CSPA class action”); *see also* R.C. 1345.09(B).<sup>1</sup>

The Eighth District declined to address the issue of whether the class members suffered any actual damages, reasoning that it is a merits issue, and not properly before it on a class certification appeal. *Id.* at ¶ 44. But the existence of actual damages goes to the heart of the rigorous analysis required under Civil Rule 23, not just an issue regarding the amount of damages that the plaintiffs may eventually recover. *Id.* at ¶¶ 69, 72 (Rocco, J., dissenting) (“[T]he CSPA's damages limitation impacts not only the damages that may ultimately be

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<sup>1</sup> Aside from the named plaintiffs, no other customer is asserting any claim relating to the purchase.

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.”); *Stammco* at ¶¶ 19-23. Under the OCSA, only a class consisting of those who sustained actual damages may move forward and be certified. *Searles* at ¶ 22.

Allowing the Eighth District decision to stand would permit trial courts to certify large classes under the OCSA based on statutory or discretionary damages, eroding the purpose and class action protections of the OCSA and opening an entirely new avenue of class action litigation under the OCSA. This creates uncertainty for businesses, professionals, and individuals who operate under the purview of the OCSA.

In addition, the Eighth District’s decision appears to have created a conflict: under established case law, including from the Eighth District, a trial court cannot certify a class under the OCSA without first requiring proof of actual damages. *See Searles v. Germain Ford of Columbus, L.L.C.*, 2009 Ohio 1323, ¶ 22 (10th Dist.) But the *Felix* decision clouds this body of case law by permitting class certification without proof of actual damages and allowing a trial court to issue discretionary or statutory damages not permitted under the OCSA.

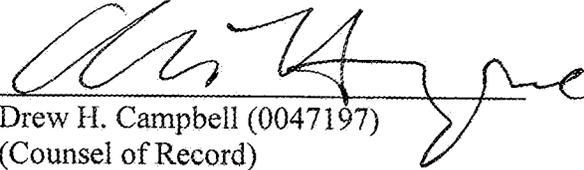
Although the Court’s most recent decision in *Cullen* addresses the issue of damages under Civil Rule 23(B), it does not address the scope of class actions under the OCSA or the requirement to show proof of actual damages prior to class certification. The Court should clarify this important issue under Ohio law and reverse the Eighth District and find that plaintiffs bringing a class action under the OCSA must show actual damages.

### CONCLUSION

The Eighth District’s decision has the potential to create a new class of class action litigation under Civil Rule 23 and the Ohio Consumer Sales Practices Act, which the current statutory framework bars. At a minimum, the Eighth District’s decision clouds the rigorous

analysis under Civ. R.23 that this Court required in *Stammco* and *Cullen*, leading to the serial certification of overbroad class actions on behalf of consumers who were not injured, harmed or damaged. Amicus curiae urge the Court to reverse the Eighth District's decision and require litigants to show actual harm and actual damages, as required by Civil Rule 23 and the Ohio Consumer Sales Practices Act.

Respectfully submitted,



Drew H. Campbell (0047197)  
(Counsel of Record)

Ali I. Haque (0087860)

Kara H. Herrnstein (0088520)

BRICKER & ECKLER LLP

100 South Third Street

Columbus, Ohio 43215-4291

Phone: (614) 227-2300

Fax: (614) 227-2390

E-mail: [dcampbell@bricker.com](mailto:dcampbell@bricker.com)

[ahaque@bricker.com](mailto:ahaque@bricker.com)

[kherrnstein@bricker.com](mailto:kherrnstein@bricker.com)

*Counsel for Amicus Curiae,  
Ohio Association of Civil Trial Attorneys*

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing pleading was served by regular U.S. mail, postage prepaid, 14th day of April, 2014, upon the following:

Joseph A. Castrodale, Esq.  
David D. Yeagley, Esq.  
Ulmer & Berne, LLP  
Skylight Office Tower  
1660 West Second Street, Suite 1100  
Cleveland, OH 44113

A. Steven Dever, Esq.  
A. Steven Dever Co., LPA  
13363 Madison Avenue  
Lakewood, Ohio 44107

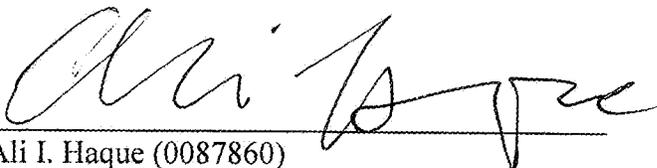
Counsel for Defendants-Appellants,  
Ganley Chevrolet, et al.

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

And

Mark Schlachet, Esq.  
3515 Severn Road  
Cleveland Heights, Ohio 44118

Counsel for the Plaintiffs-Appellees,  
Jeffrey Felix, et al.

  
\_\_\_\_\_  
Ali I. Haque (0087860)