

ORIGINAL

IN THE SUPREME COURT OF OHIO

JEFFREY FELIX, <i>et al.</i> ,)	Case No. 13-1746
)	
Plaintiffs-Appellees,)	On appeal from the Cuyahoga County Court of
)	Appeals Eighth Appellate District
v.)	Case No. CA 12 098985
)	
GANLEY CHEVROLET, INC., <i>et al.</i>)	
)	
Defendants-Appellants.)	

**AMICUS BRIEF OF
THE OHIO AUTOMOBILE DEALERS ASSOCIATION AND
THE GREATER CLEVELAND AUTOMOBILE DEALERS ASSOCIATION
IN SUPPORT OF APPELLANTS**

David A. Brown (0060101)
 Counsel of Record
 Deanna L. Stockamp (0066503)
 Stockamp & Brown, LLC
 6017 Post Road
 Dublin, Ohio 43017
 Phone: 614.761.0400
 Fax: 614.761.0303
 dbrown@stockampbrown.com
 dstockamp@stockampbrown.com

Attorneys for *Amici Curiae*
 Ohio Automobile Dealers Association and
 Greater Cleveland Automobile Dealers Association

FILED
 APR 14 2014
 CLERK OF COURT
 SUPREME COURT OF OHIO

Joseph A. Castrodale
David D. Yeagley
Ulmer & Berne LLP
Skylight Office Tower
1660 West 2nd Street, Suite 1100
Cleveland, OH 44113

A. Steven Dever (0024982)
A. Steven Dever Co., LPA
13363 Madison Avenue
Lakewood, Ohio 44107

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

Counsel for Plaintiffs-Appellees

TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF AMICUS INTEREST.....	1
ARGUMENT.....	2
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.....	2
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.....	3
CONCLUSION.....	5

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>Brown v. Am. Honda</i> , 522 F.3d 6 (1st Cir. 2008).....	2
<i>Gonzales v. Comcast Corp.</i> , 2012 WL 10621 (E.D. Cal. 2012).....	2
<i>In re Live Antitrust Litigation</i> , 247 F.R.D. 98 (C.D. Cal. 2007).....	2
<i>Little Caesar Enters. v. Smith</i> , 1995 U.S. Dist. LEXIS 20051 (E.D. Mich. Apr. 19, 1995).....	2
<i>Martino v. McDonald’s System, Inc.</i> , 86 F.R.D. 145 (N.D. Ill. 1980).....	3
<i>Ojalvo v. Board of Trustees</i> , 12 Ohio St. 3d 230 (1984).....	2
<i>Searles v. Germain Ford of Columbus, L.L.C.</i> , 2009-Ohio-1323 (10 th Dist. 2009)..	4
<i>Stammco, L.L.C. v. United Tel. Co. of Ohio</i> , 136 Ohio St. 3d 231 (2013).....	2
 <u>Statutes</u>	
R.C. 1345.09(B).....	3, 4

STATEMENT OF AMICUS 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.

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.

As a general rule, in a putative class action, a class cannot be certified where not all members of the class have been damaged. 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.”).

Against this backdrop, the undersigned *amici* respectfully suggest that the first proposition of law is relatively non-controversial. The law has long been well established, as demonstrated above, that Rule 23 does not generally permit certification of a class where not all class members have been damaged, or where individualized assessments are required to determine whether each class member was damaged. Consistent with the law of every other jurisdiction to address it, this is already the law of the State of Ohio, as established by this Court in *Stammco*. The lower courts in this case violated that clearly established principle.

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.

Under *Stammco*, and the similar cases from jurisdictions across the country, it is beyond dispute that, as a general proposition, a class cannot be certified where all members have not suffered damages or where the fact of damages requires an individualized inquiry. The question, then, is whether the Ohio Consumer Sales Practice Act (“CSPA”) - because of its statutory

damages provision – provides an exception to this general rule. And the answer, by statute, is no.

As this Court is no doubt well aware, the General Assembly sought so vigorously to discourage business from engaging in consumer fraud that it incorporated into the CSPA a provision wherein, for CSPA violations that have already been established as improper, a \$200 statutory damages award, or treble damages, may be imposed. R.C. 1345.09(B). Importantly, however, the General Assembly sought to balance its goal of deterring consumer fraud with its desire to avoid punishing businesses by exposing them to potentially economically devastating class action suits. As a result, neither statutory nor treble damages are available for class actions brought under the CSPA. *Id.* See also *Searles v. Germain Ford of Columbus, LLC*, 2009-Ohio-1323, ¶ 22 (10th Dist. 2009) (“proof of actual damages is required before certification of a R.C. 1345.09 class action is proper”). The General Assembly had the wisdom to permit statutory damages in single-plaintiff actions, where such damages can serve an important deterrent purpose. However, the General Assembly did not permit statutory damages in class action cases, where such damages can unfairly devastate a small business, such as a new automobile dealership, even when consumers are not actually harmed in any way.

Thus, the CSPA prohibits precisely what the lower courts in this case countenanced. The trial court awarded, in a class action brought under the CSPA, damages of \$200 per class member, despite the fact that the CSPA explicitly prohibits application of the \$200 statutory damages award in class action cases.¹ Surely the law does not permit a trial court to evade the

¹ R.C. 1345.09(B) was amended in 2007 to, among other things, limit the damages that may be trebled in a single-plaintiff case to “actual economic damages” rather than “actual damages.” The 2007 amendment to the CSPA is irrelevant in this context. Both before and after the amendment, trebling of *any* award, and imposition of the \$200 statutory damages amount, were limited to non-class cases. Both before and after the 2007 amendment, the CSPA prohibited an award of statutory or treble damages in class action cases.

CSPA's prohibition on awarding statutory damages in a class action case by simply calling the damages "discretionary" rather than "statutory." A rose by any other name . . .

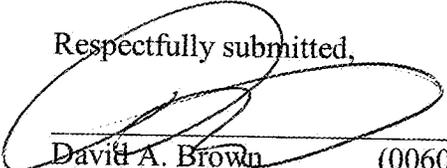
If the CSPA's \$200 statutory damages provision could be applied on a class-wide basis, there would be at least a colorable argument that actual damages need not be shown by class members because suffering actual damages would not be an element of the CSPA claim. Because the \$200 statutory damages provision in the CSPA is not applicable on a class-wide basis, however, actual damages are an element of a CSPA class action. And where, as here, the class contains primarily individuals who were not actually damaged, the class cannot be properly certified.

Thus, the general rule prevails. All class members must have suffered actual damages in order for class certification to be proper. Class certification in this case was therefore improper, and must be reversed.

CONCLUSION

The OADA and the GCADA respectfully suggest that this Court should reverse the decision of the Court of Appeals and hold that certification of a class of CSPA plaintiffs requires a class in which all members suffered actual damages.

Respectfully submitted,



David A. Brown (0060101)

Deanna L. Stockamp (0066503)

Stockamp & Brown, LLC

6017 Post Road

Dublin, Ohio 43017

Phone: 614.761.0400

Fax: 614.761.0303

Attorneys for *Amicus*

Ohio Automobile Dealers Association and

Greater Cleveland Automobile Dealers Association

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing *amicus* brief was served on the following counsel, by ordinary U.S. mail, postage prepaid, this 14th day of April, 2014:

Joseph A. Castrodale
David D. Yeagley
Ulmer & Berne LLP
Skylight Office Tower
1660 West 2nd Street, Suite 1100
Cleveland, OH 44113

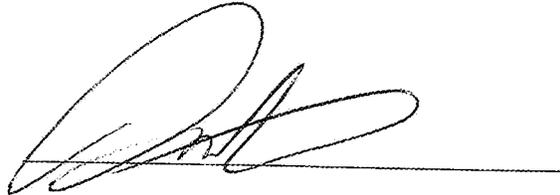
A. Steven Dever (0024982)
A. Steven Dever Co., LPA
13363 Madison Avenue
Lakewood, Ohio 44107

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

Counsel for Plaintiffs-Appellees

A handwritten signature in black ink, appearing to read 'Mark Schlachet', is written over a horizontal line.