**IN THE SUPREME COURT OF OHIO**

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|---|---|---|
| CRAIG L. WHITAKER | ) | Case No: 2005-0331 |
| | ) | |
| Appellant | ) | |
| | ) | On Appeal from the Summit County |
| -vs- | ) | Court of Appeals, Ninth Appellate District |
| | ) | |
| M.T. AUTOMOTIVE, INC., d/b/a MONTROSE TOYOTA | ) | Court of Appeals Case No. 21836 |
| | ) | 2004-Ohio-7166 |
| Appellee | ) | |

# AMICUS BRIEF IN SUPPORT OF APPELLANT BY AMICUS CURIAE, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES


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## STATEMENT OF INTEREST OF AMICUS CURIAE

Mr. Whitaker's appeal arises from a jury's finding of eleven different acts of unfair, deceptive or unconscionable conduct under Ohio's Consumer Sales Practices Act ("CSPA"). Although the CSPA allows a consumer victim to "recover his damages," the Appellate Court erroneously limited Mr. Whitaker to recovering only "economic damages." The Appellate Court mistakenly believed that it had "previously determined that plaintiffs may recover only economic damages under the CSPA. *See Marrone v. Phillip Morris, Inc.,* 9th Dist. No. 03CA0120-M, 2004-Ohio-4874."

For three different reasons, the National Association of Consumer Advocates (NACA) urges this Court to reverse the Appellate Court's decision. The first reason flows from the fundamental civic contract which supports our civil judicial system. All citizens and businesses expect and believe that the judicial system is guided by the rule of law, that past cases are accurate guides to legal results, and that errors will be corrected. The Appellate Court's statement regarding *Marrone* is so fundamentally wrong that this Court must correct it to maintain that civic contract. The second reason is that the CSPA is based on a model statute and most states have a similar provision based on the same model statute. An erroneous limitation of this type of model statute can create needless and expensive litigation in other states, and needless litigation harms all parties to consumer transactions. The third reason the underlying decision must be corrected is because the deceptive practice by the defendant is currently the subject of litigation at all levels of both the state and federal court systems. The message sent by the Appellate Court's decision is that the legal system recognizes no

harm to a consumer when a seller falsely promises an approved transaction, wastes a consumer's time, tries by trick or coercion to have a consumer sign a less advantageous contract, and then tries to keep someone's substantial deposit without cause. This message is wrong and must be changed.

NACA is a nationwide, non-profit corporation with over 1000 members who are private and public sector attorneys, legal services attorneys, law professors, law students and non-attorney consumer advocates. Its interests primarily involve the protection and representation of consumers and its mission is to promote justice for all consumers. From its inception, NACA has focused on issues that concern abusive and fraudulent practices by businesses that provide financial and credit-related services.

As part of promoting justice for all consumers, NACA provides training on consumer law issues throughout the country, including auto-fraud trainings. As part of that training process, NACA monitors and responds to various industry practices in retail car sales. The specific fact practice at issue in this case, the deceptive use of conditional financial agreements, is a widespread practice throughout the country. NACA members are familiar with this specific scheme, and with the federal and state laws that regulate it. Regarding the specific legal issue of the available damages under consumer protection laws, NACA follows the development of the cases in this area and consults with the agencies that develop and enforce those consumer laws. For the three reasons explained above, NACA urges this Court to reverse the Appellate Court's decision.

## STATEMENT OF THE CASE AND FACTS

As found by the jury, Mr. Whitaker was the victim of a deceptive practice when he attempted to lease a truck. After Mr. Whitaker told Montrose Toyota that he could get a lease with a monthly payment of $240 to $260 per month from his credit union, Laura Barron, the business manager for Montrose Toyota, falsely told him that he was approved for $230 per month lease through Montrose Toyota. That misrepresentation accomplished its the unlawful goal of keeping Mr. Whitaker's credit union from receiving the benefit of the good terms of its valid offer.

As expected, Mr. Whitaker decided to accept Montrose Toyota's lease offer because he believed that he was approved at that monthly payment. Montrose Toyota then prepared is a lease contract between Mr. Whitaker and Montrose Toyota that Montrose then attempted to sell for its own profit. Despite Ms. Barron's representation to Mr. Whitaker about his approval, she knew Montrose Toyota had not approved the lease at that monthly payment, and she therefore included a "Spot Delivery" agreement in the many contract documents. She misrepresented the contents of that side agreement by saying to him "This says we're responsible for obtaining your financing." (T. 482:9-20) As she knew, the purpose of that document was to allow Montrose Toyota to later claim it had the right to change the terms of the written lease to the terms that it would really approve.

Within a week of paying his $1,537.00 deposit, Mr. Whitaker was told that the only terms that had been approved required a higher monthly payment of $297.00. By that time he had already modified the truck by installing a stereo-radio. When Mr. Whitaker refused to

agree to a higher payment than he was first promised, he offered to find a co-signer for the original deal and Montrose Toyota agreed. When the co-signer, his father, came in **to** sign the contract, he noticed that the payment was still higher than $230.00. Rather than allow Mr. Whitaker's father to co-sign the original deal, Montrose Toyota had altered the transaction by increasing the bank fee, dropping the service contract, and increasing the monthly payment. Because Mr. Whitaker would not sign the new documents, Montrose Toyota would not let him keep the truck. His deposit of $1,537.00 was not returned for a long time, and he never received back the radio he installed in the truck. He was without transportation for about ten weeks before he was able to get a new truck, and he had to borrow money from his parents to get that vehicle.

Although the Appellate Court stated that Montrose Toyota claimed that it was a mistake that it did not return the deposit, the evidence at the trial was quite different. Mr. Whitaker testified that when he asked for his deposit back, he was told "you broke the contract, we don't have to give you anything." (T. 500:12-18). The following day he spoke on the phone to several Montrose Toyota employees who participated in the call on a speakerphone, again asked for his deposit back, and was told that it would not be returned. (T. 502-503). Additionally, the Appellate Court did not describe the extent to which Montrose Toyota unlawfully uses its Spot Delivery Agreement to force customers to sign new transactions. The process of forcing a customer to come back and sign new papers occurs at Montrose Toyota sometimes because it has simply come up with a more profitable way for it to structure the transaction. (T. 205-206).

Furthermore, the Appellate Court did not describe the frustration and aggravation caused to Mr. Whitaker by Montrose Toyota's conduct, and did not consider Mr. Whitaker

being without transportation as an economic damage. Finally, in its opinion the Appellate Court stated "Appellee offered no evidence showing that Appellant's CSPA violations left him unable to procure another vehicle for ten weeks" and in its next sentence state "Appellee did testify that he was unable to pay for the down payment on the new vehicle because Appellant wrongfully withheld his deposit." (Decision and Journal entry, p. 8).

The jury found eleven violations of the CSPA, and awarded damages of $105,000.00. It also awarded $367.15 for the conversion of the radio. Pursuant to the CSPA, the damage award was trebled. Montrose Toyota's request for a new trial and for a reduction in the jury's award were both denied, and neither are on appeal. Because the Appellate Court believed that the CSPA only allows for economic damages, the Appellate Court reversed the CSPA damages award and instructed the trial court to enter judgment on statutory damages under the CSPA.

## ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

***Proposition of Law***

A CONSUMER PURSUING PRIVATE REMEDIES UNDER OHIO'S CONSUMER SALES PRACTICES ACT IS ENTITLED TO RECOVER ALL DAMAGES THAT NATURALLY FLOW FROM THE UNFAIR AND DECEPTIVE CONDUCT OF THE SUPPLIER.

### A. Because our judicial system requires proper application of precedent, the misstatement of *Marrone* must be corrected.

For statutes to achieve their purposes, all interested parties need consistent and reliable interpretation of the statutory terms. The Ohio Consumer Sales Practices Act prohibits unfair, deceptive and unconscionable conduct in consumer transactions. Ohio R.C. 1345.09(A)-(D) sets forth "Private Remedies" that include rescission or recovery of "damages," treble "actual damages" or minimum statutory damages under certain circumstances, declaratory relief, and any other appropriate relief. Like any other law, consumers, businesses, state agencies, and

their respective counsel must be able to reliably predict how a court will construe the CSPA's words, especially its remedies provisions. In the modern economy and with the established use of forum selection clauses, those interested parties are found throughout the United States. The well-established principles about the use and significance of precedence provide that reliability to them. The more confident and accurate all parties are in that prediction, the less they will need court involvement to resolve their disputes.

The Appellate Court's decision must be reversed because its one authority for restricting the word "damages" under the CSPA to "economic damages" did not even analyze the issue, and that limitation contradicts existing Ohio law. Its opinion is simply a misread of *Marrone* because that case never addressed whether the CSPA limited damages to "economic damages." *See Marrone v. Phillip Morris, Inc.,* 9th Dist. No. 03CA0120-M, 2004-Ohio-4874. Furthermore, this Court has already held that when a statute allows a civil claim for "damages," that term is "an inclusive term embracing the panoply of legally recognized pecuniary relief." *Rice v. Certainteed Corp.*, 84 Ohio St.3d 417, 419 (1999). Because of the similarity between the CSPA and the statute in *Rice*, its specific holding must apply to the CSPA.

The basic principles for deciding legal issues help the general public to continue its faith in the legal system, help lawyers to know how to advise their clients, and help businesses to know the rules under which they and their competitors operate. All parties understand that mistakes can be made, but put their trust in the self-corrective measures built into the legal system. As part of its training function, NACA organizes trainings throughout the country that are premised on two truths: one, consumer laws, like all law, can be known, and two, our economy is improved when they are applied. For these reasons, the mistaken reliance on *Marrone* must be reversed. Unless this Court intends to overrule *Rice,* the word "damages" in

the CSPA must include all damages, whether phrased as economic or non-economic, compensatory, or punitive. The limitation under 1345.09(B) to "actual damages" then properly restricts punitive damages from any trebling.

Because Montrose Toyota did not appeal Judge Schneiderman's decision that "there is nothing in the record to indicate that the jury was wrongfully influenced" and its award was not excessive, the statutory issue is the same as if the award was $2,500.00.

**B. Because the CSPA is based on a model statute, the term "damages" should be construed with reference to other consumer statutes.**

Enacted in the early 1970s, the CSPA is modeled on the Uniform Consumer Sales Practices Act. *See Thomas v. Sun Furniture and Appliance Company*, 61 Ohio App.2d 78, 81 (1st Dist. 1978). "Section 1 of the Uniform Consumer Sales Practices Act 97A Uniform Laws Anno. 3 [1978]) states that it is to be construed not inconsistently with the policies of the Federal Trade Commission Act." Id. Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1), which prohibits "unfair or deceptive acts or practices" is the initial basis for the "Little FTC Acts" adopted by the states. Because the FTC Act provides for enforcement only by the FTC in the nature of penalties, that Act provides no direct guidance for what damages are to be recovered under the consumer protection statutes modeled on it. S*ee* 15 U.S.C. § 45(l) and 45(m).

Like most other states, Ohio adopted a comprehensive consumer protection statute to provide protections that were lacking under the common law. *See Thomas*, 61 Ohio App. 2d at 81. As stated in the Ohio Legislative Service Commission report used to enact CSPA, because "marketing and consumer services have become more complex, the private remedies of the common law, and traditional criminal actions, have become relatively ineffective as a means by which the consumer may protect himself, and government has intervened." Id.

Because of their similar structure and common source, courts regularly look to other jurisdictions in interpreting these consumer statutes.

Based on the type of damages available under consumer protection statutes like the CSPA in other states, no rationale exists to limit the word "damages" to merely "economic damages." In *Bump v. Robbins*, 509 N.E.2d 12 (Mass App. 1987), and in *Ybarra v. Saldona*, 624 S.W.2d 948 (Tex. Civ. App. 1981), the consumer was awarded damages for lost time. In *Hale v. Basin Motor Co.*, 795 P.2d 1006 (N.M. 1990), that Supreme Court recognized that the time and frustration spent responding to an unfair or deceptive trade practice was a major factor in the enactment of consumer protection laws. Mental distress was held to be compensable under Michigan's consumer protection statute in *Avery v. Industry Mortgage Co.*, 135 F. Supp.2d 840 (W.D. Mich. 2001); *see also Lozada v. Dale Baker Oldsmobile, Inc.,* 136 F. Supp. 2d 719 (W.D. Mich. 2001). Additionally, an award for aggravation and inconvenience was affirmed in *Roche v. Fireside Chrysler-Plymouth*, 600 N.E.2d 1218 (Ill. App. Ct. 1992). Like *Rice*, these cases recognize that in a statute designed to protect the general public interest the word "damages" is not a restrictive term.

Similarly, the use of the word "damages" in federal consumer protection statutes is not considered to be limited to "economic damages." Under federal consumer protection statutes, "damages" not only includes any out-of-pocket expenses and property losses, but also damages for personal humiliation, embarrassment, mental anguish, and emotional distress, and the trier of fact is given no fixed standard or measure in the case of these intangible items. *See e.g. Dalton v. Capital Associated Industries, Inc.,* 257 F.3d 409, 418 (4th Cir. 2001); *Guimond v. Trans Union Credit Corporation*, 45 F.3d 1329, 1333 (9th Cir. 1995); *Smith v. Law Office of Mitchell N. Kay*, 124 B.R. 182, 185 (D. Del. 1990); *Johnson v. Dept. of Treasury,*

*I.R.S.*, 700 F.2d 971, 985 fn. 39 (5th Cir. 1983); *Bryant v. TRW, Inc.*, 487 F.Supp. 1234, 1239 fn. 7 (E.D. Mich. 1980), aff'd. 689 F.2d 72 (6th Cir. 1982); *Jones v. Credit Bureau of Huntington, Inc.*, 184 W.Va. 112, 399 S.E.2d 694, 699 fn. 5 (1990).

Similar to the CSPA, these statutes rely on the jury to perform the crucial role in determining when damages have been inflicted. As recognized by Judge Schneiderman in denying Montrose Toyota's motions for a new trial and remittitur, such statutes rely on the jury to fix the damages caused by consumer deception because a "jury is a fair sample of the community at large. For downright common sense which discerns the hidden truth, we commend a jury of ordinary citizens."

**C. The decision must also be reversed because of the harmful effects to honest businesses if the legal system does not recognize the damage caused by Montrose Toyota's deceptive business practice.**

**1. Consumer protection laws are written broadly to protect the economy by ensuring an even field between businesses.**

The underlying reason for nationwide adoption of consumer protection statutes was to protect and ensure healthy marketplaces where the competition necessary for our economy could flourish. The connection between effective enforcement of consumer protection statutes and a healthy economy is directly stated by federal consumer protection statutes.

> The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers.

15 U.S.C. § 1601. The Truth in Lending Act, along with the other statutes within the Consumer Credit Protection Act (CCPA), 15 U.S.C. §§ 1601-1693r, are designed to allow our free-market economy to function properly, and demonstrate how vital consumer protection is to a

competitive marketplace. The CSPA similarly enhances competition among businesses by creating the level playing field on which honest businesses compete. Effective enforcement of all these consumer protection statutes protects the American economy strong from the danger posed by inefficient markets. *See* Congressional Findings and Statement of Purpose for the Equal Credit Opportunity Act, Pub. L. No. 93-495, § 502, 88 Stat. 1525 (1974)("Economic stabilization would be enhanced and competition among the various financial institutions and other firms engaged in the extension of credit would be strengthened . . . by the informed use of credit which Congress has heretofore sought to promote."). In short, good consumer protection is good for business because deceptive practices hurt honest businesses.

Like the federal CCPA, the CSPA fundamentally protects the businesses that "build the better mouse trap." The premise of our economy is that consumers will choose to give their business to those entities that deliver better value or lower prices. The mandated honesty of the CCPA and the CSPA gives the more efficient business the means to effectively compete with the less efficient business. For example, Mr. Whitaker's credit union was the ultimate target of the deceptive practices committed against Mr. Whitaker because Montrose Toyota knew he intended to lease from his credit union at lower monthly terms than it could currently approve. The Ohio legislature sought to ensure that the CSPA's accomplished its important economic goal and therefore specifically removed any restriction on the word "damages" in R.C. 1345.09(A). The Appellate Court improperly limited the very term the legislature sought to expand.

The yo-yo deception of a falsely promised approval, as performed by Montrose Toyota, is the same whether practiced in a lease transaction or a straight financing transaction. The primary deception is falsely representing that a contract with the dealer has been approved so

that the consumers will not take their business elsewhere. Montrose Toyota made this representation to Mr. Whitaker first by telling him he was approved at $230.00 per month, then by giving him a lengthy contract that clearly and conspicuously stated the same, then by misrepresenting that the Spot Delivery agreement meant that Montrose Toyota would be responsible for the financing, and then by agreeing that he could have that monthly payment with a co-signer. These false representations achieved their anti-competitive goal of keeping him from getting a lease from his credit union for that truck. As the entity with the better offer, the credit union could not compete with the deceptive promise.

Those businesses who regularly misrepresent that approval of a contract wrongly justify their deceptions by claiming they are ultimately able to approve the contract in the majority of transactions. *See* Appellee's Memorandum in Opposition to Jurisdiction, p.4. This purported justification merely highlights the success of the deceptive practice and explains its pervasive nature. Restated accurately, Montrose Toyota claims "the majority of the time we successfully keep customers from shopping elsewhere for loans or leases by falsely representing to them that we had already approved a contract." Consequently, in the majority of the cases, the victim is always another financial entity who was not given a chance to compete for the customer's business. The deception's profitable success rate provides no justification to claim that, for the minority of cases, the CSPA should not recognize the damage inflicted on a consumer like Mr. Whitaker. To provide an incentive for compliance, the legislature has already determined it should pay for all damages caused by its violation of law.

**2. The Appellate Court's decision improperly gives a green light to increased use of the deceptive yo-yo scheme.**

The underlying fact pattern shows a classic yo-yo deception where the dealer first lets the consumer leave with the car, and then pulls on the string to bring the consumer back to the

dealership to sign new documents on less advantageous terms. Like the down payment Montrose Toyota did not return, the string is usually the down payment or trade-in, and the dealer simply yanks the consumer back by revealing that, contrary to the initial representations, the contract was not really approved yet. *See e.g. Rucker v. Sheehy Alexandria*, 228 F. Supp. 2d 711, 718 (E.D. Va. 2002) (*reconsideration denied* 244 F. Supp.2d 618 (E.D. Va. 2003)). The Fourth Circuit similarly explained how in a yo-yo sale a dealer forced a consumer to sign new contracts by fraudulent means. *See Nigh v. Koons Buick Pontiac GMC Jeep*, 310 F.3d 119, 122 (4th Cir. 2003)(*rev'd on other grounds*).

The pervasive nature of this deceptive practice in today's retail automobile industry is best shown by a powerpoint presentation available on the National Automotive Finance Association's website. *See* "Spot Delivery in these United States: Legal Updates and Trends in Spot Deliveries." http://www.nafassociation.com/Powerpoint/05Johnson.pdf. Screen 11 of that presentation accurately summarizes the Appellate Court's decision in this case as reversing the damage award when a jury found eleven violations of the CSPA. The presentation then provides several color coded maps of the United States showing the states where such spot delivery cases have been decided, and ranks the states by red, yellow, or green lights for whether the spot delivery practice can continue. Screen 17 then claims that Ohio is one of fourteen states where such practices are given a green light. As practiced by Montrose Toyota in this case, and as confirmed by the members of the National Association of Consumer Advocates around the country, this spot delivery practice is tied to the unlawful misrepresentation of approval of the initial contract. In that yo-yo deception the damages to the consumer are almost always similar to Mr. Whitaker's.

In addition to falsely claiming that such deception causes no recognizable harm, the deceptive actors who perpetrate this scheme continually mischaracterize the basic contract between the parties. The lease, Exhibit 9 at trial, is signed by Mr. Whitaker and by Montrose Toyota's business manager, Ms. Barron. As a fully executed and integrated contract, it appears to offer that approved financing by Montrose Toyota. Although Montrose Toyota continues to characterize this transaction as one where it "was unable to secure financing for him" or "was unable to obtain financing acceptable to the customer" (see Appellee's Memorandum in Opposition to Jurisdiction, p.1 and 4), the market reality is that Montrose was unable to sell the executed lease on terms acceptable to it. In today's economy, a signed lease or signed credit contract is a marketable item that a dealer seeks to sell for a profit. Despite that market reality, Montrose Toyota claimed to Mr. Whitaker, and stills claims to this Court, that when its efforts to sell its financial product on the financial market for its own benefit was actually an effort to work as some kind of broker on Mr. Whitaker's behalf.

In today's financial market, car dealers now seek additional profits by creating credit and lease contracts that they sell to the highest bidder. Such sales are not illegal, but the reality of the transaction must be recognized. Kelly Gardiner, Financial Manager for Montrose Toyota, explained to the jury that Montrose Toyota expected to make $532.00 more on the first transaction than the second one it put together, but that it would only make that money if it sold the contract. (T.695:3-20). Montrose Toyota was putting together the second transaction to help Mr. Whitaker to help itself because it was unable to sell the first transaction on the terms it expected. Instead of falsely informing Mr. Whitaker that he was approved, it could have simply let him obtain his own financing through his credit union pursuant to the credit union's valid offer. Montrose Toyota used the yo-yo scam to try to make additional money for itself by

creating a financial contract that it then hoped to sell for additional profit, and used the false representation of approval to unlawfully buy time in which to arrange that possible sale. The accurate statement is that Montrose Toyota canceled the transaction when it could not sell that product on the terms it wanted. The jury properly found such conduct a violation of the CSPA and awarded the damages it found to exist.

The Appellate Court's decision to limit the CSPA to only economic damages will only encourage such harmful practices. To stop the yo-yo scam, and other sophisticated consumer frauds, the damages available under the CSPA must include both economic and non-economic damages.

## CONCLUSION

The clear language of Ohio's Consumers Sales Practice Act states that a consumer may elect to "recover his damages" RC § 1345.09(A). For the foregoing reasons, the National Association of Consumer Advocates respectfully urges this Court to reverse the Appellate Court's unwarranted restriction of the phrase "damages" to only economic damages and instead rule that "damages" include the full range of damages recognized by law.

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

A copy of the foregoing *Amicus Brief in Support of Appellant* was sent by U.S. Regular Mail and email to **Laura K. McDowall**, Attorney for Appellant Whitaker, Young & McDowall, 507 Canton Road / P.O. Box 6210, Akron, Ohio 44312; to **Clair Dickinson**, Attorney for Appellee M.T. Automotive Inc., d/b/a/ Montrose Toyota, Brouse McDowell, First National Tower, Akron, OH 44308-1471, and to **Todd L. Willis**, Willis & Willis Co., L.P.A., 670 West Market Street, Akron, OH 44303,

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