

COMMONWEALTH OF KENTUCKY  
SUPREME COURT OF KENTUCKY  
NO. 2005-SC-0999-DG  
C/W NO. 2006-SC-432-DG

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CRAIG & BISHOP, INC.

APPELLANT/CROSS-APPELLEE

v.

**APPEAL FROM JEFFERSON CIRCUIT COURT  
NO. 2003-CI-7221  
COURT OF APPEALS OF KENTUCKY  
NO. 2004-CA-1883-MR**

CHRISTY PILES, CHARLES WARNER,  
and ELLEN FRIEDMAN

APPELLEES/CROSS-APPELLANTS

\* \* \* \* \*

**AMICUS BRIEF OF THE KENTUCKY ATTORNEY GENERAL**

\* \* \* \* \*

Respectfully submitted,

*Maryellen B. Mynear*

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**CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of this Amicus Brief was served, postage prepaid, upon: George Geoghegan III, Clerk, Court of Appeals of Kentucky, 360 Democrat Drive, Frankfort, KY 40601; Hon. Stephen Mershon, Chief Judge, Jefferson Circuit Court, Division 7, 700 West Jefferson Street, Louisville, KY 40202; Ellen G. Friedman, 125 South Sixth Street, Louisville, KY 40202; and Fred E. Fischer and Joseph Michael Kelly, 713 West Main Street, Louisville, KY 40202, this 20<sup>th</sup> day of December, 2006.

*Maryellen B. Mynear*  
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**STATEMENT OF POINTS AND AUTHORITIES**

**INTRODUCTION AND STATEMENT OF INTEREST.....1**

**ARGUMENT..... 1 - 9**

**I. KENTUCKY’S CONSUMER PROTECTION ACT  
DOES NOT REQUIRE THAT A PURCHASE BE EVIDENCED  
BY FORMAL WRITTEN CONTRACT.....1 - 5**

KRS 367.220.....1, 4, 5

KRS 355.1-201(2)(ac).....2

Stafford v. Cross Country Bank, 262 F.Supp.2d 776 (W.D.Ky. 2003).....2, 3

KRS 367.170(1).....3

Balderston v. Medtronic Sofamor Danek, Inc., 285 F.3d 238  
(3<sup>rd</sup> Circ. 2002).....3

Stevens v. Motorists Mut. Ins. Co., Ky., 759 S.W.2d 819, 821  
(1988).....4

Telcom Directories, Inc. v. Com. ex rel. Cowan, Ky. App.,  
833 S.W.2d 848 (1991).....4

Dare To Be Great, Inc. v. Com. ex rel. Hancock, Ky.,  
511 S.W.2d 224 (1974).....4

KRS 367.220(3).....4

Alexander v. S & M Motors, Inc., Ky., 28 S.W.3d 303, 305  
(2000).....4, 5

**II. THE KENTUCKY CONSUMER PROTECTION ACT  
PROVIDES A CLEAR BASIS FOR THE AWARD OF PUNITIVE  
DAMAGES, AND THE DAMAGES AWARDED  
WERE NOT EXCESSIVE.....5 - 8**

Phelps v. Louisville Water Co., Ky., 103 S.W.3d 46  
(2003).....6

<u>American Rockwell Intern. Corp. v. Wilhite</u> , Ky. App., 143 S.W.3d 604 (2003).....	6
<u>Simpson County Steeplechase Ass'n, Inc. v. Roberts</u> , Ky. App., 898 S.W.2d 523 (1995).....	6
<u>TXO Production Corp. v. Alliance Resources Group</u> , 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993).....	6
<u>First Farmers Bank of Somerset, Inc. v. Henderson</u> , Ky. App., 763 S.W.2d 137 (1988).....	6, 7
<u>Sand Hill Energy, Inc. v. Ford Motor Co.</u> , Ky., 83 S.W.3d 483 (2001).....	7
<u>Ford Motor Co. v. Smith</u> , 538 U.S. 1028, 125 S.Ct. 2072, 155 L.Ed.2d 1056 (2003).....	7
<u>Sand Hill Energy, Inc. v. Smith</u> , Ky., 142 S.W.3d 153 (2004).....	7
<u>State Farm Mut. Ins. Co.v. Campbell</u> , 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003).....	7, 8
<u>BMW of North America, Inc. v. Gore</u> , 517 U.S. 559, 575, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996).....	8
<u>Restatement (Second) of Torts</u> , sec. 903.....	8
<u>Cooper Industries, Inc. v. Leatherman Tool Group, Inc.</u> , 532 U.S. 424, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001).....	8
<b>CONCLUSION</b> .....	9

## INTRODUCTION AND STATEMENT OF INTEREST

This appeal involves the application of the Kentucky Consumer Protection Act to a case where a jury found a used car dealership to have engaged in a pattern of fraudulent and misleading conduct that induced a young couple to take “spot delivery” of a vehicle, including the dealer’s failure or refusal to return the couple’s trade-in vehicle when financing could not be obtained. On appeal, the Appellant dealership argues *inter alia* that because the jury found that an enforceable contract did not exist between the parties, the Appellees cannot recover under the Kentucky Consumer Protection Act. The Appellants also argue that the punitive damages award should be set aside as grossly excessive.

As the chief law enforcement officer for the Commonwealth of Kentucky, including consumer actions under KRS Chapter 367 – Kentucky’s Consumer Protection Act – the Attorney General possesses significant interest in the potential precedential effect of this case and therefore tenders this *amicus curiae* brief in opposition to the positions espoused by the Appellants. KRS 367.220, the statute under which the Appellees brought their action, encompasses the conduct of the Appellants and a ruling that a “purchase” must be formally consummated through a written contract in order to support a private cause of action would ignore both legislative intent and existing case law. KRS 367.220 also fully supports an award of punitive damages and in light of the facts of this case, the \$50,000 jury award was appropriate and should be affirmed.

## ARGUMENT

### **I. Kentucky’s Consumer Protection Act Does Not Require that a Purchase be Evidenced by Formal Written Contract.**

KRS 367.220 provides a private cause of action to “[a]ny person who purchases or leases goods or services primarily for personal, family or household purposes and thereby

suffers any ascertainable loss of money or property...”. The terms “purchases” and “leases” are not defined in the Kentucky Consumer Protection Act [hereinafter, “KCPA”]. Appellant argues that because the jury found there was not an enforceable contract between the parties, no “purchase” occurred. Appellant cites to the definition contained in Kentucky’s Uniform Commercial Code to support its contention that Ms. Piles and Mr. Warner are not purchasers. In point of fact, however, the Uniform Commercial Code’s definition suggests the opposite result.

KRS 355.1-201(2)(ac) broadly defines “purchase” as “...taking by sale, discount, negotiation, mortgage, pledge, lien, issue or reissue, gift or any other voluntary transaction creating an interest in property.” In the case at bar, consumers Piles and Warner went to the Appellant dealership and *negotiated* for the purchase of the vehicle. Piles and Warner *pledged Warner’s 1997 Nissan* in partial exchange for the vehicle being offered for sale by Appellant. Piles and Warner *took* spot delivery of the dealership’s Camaro and left Warner’s 1997 Nissan with the dealer. As evidenced by the dealership’s quick sale of Mr. Warner’s trade-in vehicle, it certainly believed it had an *interest* in the trade-in. “To deny a potential remedy simply because the consumer says he never intended to become a purchaser *when, for all practical purposes he was treated as one*, would belittle the KCPA’s purpose. It would create an unintended loophole where individuals are treated like customers, yet denied KCPA’s protections.” Stafford v. Cross Country Bank, 262 F.Supp.2d 776 (W.D.Ky. 2003) (emphasis added).

A consumer need not enter into a formal written contract in order to engage in the “purchase” of a good or service. Voluntary transactions occur every day across the Commonwealth where goods or services are purchased or exchanged without necessity of

written contract. Kentucky's Consumer Protection Act protects consumers from "unfair, false, misleading or deceptive acts or practices in the conduct of any trade or commerce." KRS 367.170(1). To hold that a business can evade application of this law simply by avoiding the use of a written contract defies common sense and frustrates the clear intention of KCPA. As noted by the Court of Appeals, "[t]o deny Warner and Piles a remedy simply because the jury found that there was no enforceable contract would frustrate the Act's purpose to afford the consuming public protection against unscrupulous business practices." Opinion, p.10 (citing Stafford, *supra*, 262 F.Supp.2d at 793).

Appellant's citation to Balderston v. Medtronic Sofamor Danek, Inc., 285 F.3d 238 (3<sup>rd</sup> Circ. 2002) for the proposition that other states have applied a strict interpretation to the word "purchaser" under their consumer protection laws is misplaced. The Balderston case involved an orthopaedic surgeon who sued the manufacturer of pedicle (i.e., bone) screws for use in spinal fusion surgery. The cost of the screws were billed to the patient and therefore purchased by the patients, not the surgeon, and the court disallowed recovery under the state consumer protection law due to the lack of privity between the surgeon and the screw manufacturer:

Because Dr. Balderston's patients, not Dr. Balderston, 'purchased' the screws, the Court found Dr. Balderston lacked standing under the CPL. Alternatively, the Court held Dr. Balderston could not qualify as a 'purchaser' under the statute, because any 'purchase' was for business, not 'personal, family or household' use.

Balderston, 285 F.3d at 240 (affirming trial court's dismissal of Dr. Balderston's suit).

Here, the jury found that the Appellant dealership engaged in common law fraud and that the dealership's conduct violated the KCPA.<sup>1</sup> On appeal, the Court of Appeals found that the Appellees did not establish the elements of common law fraud sufficient to have the claim submitted to the jury. However, as noted by the Court of Appeals, the KCPA is much broader in its prohibition and covers conduct beyond and other than common law fraud. Hence, the Court of Appeals correctly ruled that the KCPA claim was properly submitted to the jury and this finding should be upheld on appeal.

Such a finding is consistent with established Kentucky case law. "Our examination and analysis of the various cases indicates clearly that the Kentucky legislature created a statute which has the broadest application in order to give Kentucky consumers the broadest possible protection for allegedly illegal acts." Stevens v. Motorists Mut. Ins. Co., Ky., 759 S.W.2d 819, 821 (1988) (discussing whether KRS 367.220 provided a private cause of action regarding a consumer's claim on her insurance policy). Kentucky courts have consistently held that the terms "false," "misleading" and "deceptive" are not overly broad or unconstitutionally vague. Telcom Directories, Inc. v. Com. ex rel. Cowan, Ky. App., 833 S.W.2d 848 (1991); Dare To Be Great, Inc. v. Com. ex rel. Hancock, Ky., 511 S.W.2d 224 (1974).

Moreover, public policy underlies the statute's broad application. The Attorney General cannot be all places at all times, and private litigation is both necessary and appropriate to address unscrupulous business practices. This public policy of encouraging private litigants is demonstrated by the availability of attorneys' fees found in the KCPA for successful litigants. KRS 367.220(3); see, e.g., Alexander v. S & M Motors, Inc., Ky., 28

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<sup>1</sup> As discussed in greater detail in Section II, *infra*, even if this Court upholds the Court of Appeals' dismissal of the common law fraud claims, the appellees demonstrated an independent violation of the Kentucky Consumer Protection Act by the appellants.

S.W.3d 303, 305 (2000) (“A further aim is to provide attorneys with incentive for representing litigants who assert claims which serve an ultimate public purpose ( i.e., a deterrent to conduct resulting in unfair trade practices which perpetrate fraud and deception upon the public.”)). For this Court to hold that only “purchases” consummated through formal written contract are actionable under the KCPA would defeat this laudable public purpose.

For the foregoing reasons, the decision of the Kentucky Court of Appeals affirming the trial court’s submission of the Kentucky Consumer Protection Act claim to the jury should be upheld.

**II. The Kentucky Consumer Protection Act Provides a Clear Basis for the Award of Punitive Damages, and the Damages Awarded Were Not Excessive.**

The appellate court found that the appellees did not sufficiently establish the elements of common law fraud and that this claim should not have been submitted to the jury. The Attorney General notes that this finding is challenged by the appellees, as cross appellants, and defers to the parties in interest to argue the particular facts of this case with regard to this claim. As noted by the Court of Appeals, the KCPA supports an independent award of punitive damages. KRS 367.220 provides: “Nothing in this subsection shall be construed to limit a person’s right to seek punitive damages where appropriate.”

As discussed in Section I, *supra*, the conduct of the appellants was properly found by the jury to have violated the KCPA, regardless of whether a written, enforceable contract was reached between the parties. Therefore, the award of punitive damages was appropriate. Contrary to appellant’s argument here, the punitive damages awarded by the jury were not “grossly excessive under the circumstances.” Appellant’s Brief, p. 16.



The appellant's overall conduct in the case at bar, including steering appellees Piles and Warner, a young and inexperienced couple, into a vehicle costing more than three times than the vehicle they initially sought to purchase, "promising" financing and then refusing to return their vehicle once financing fell through – while continuing to threaten the couple and lie about the whereabouts or circumstances surrounding Warner's trade-in – clearly supports a punitive damage award. Obviously, the size of the punitive damages award was intended to punish this conduct, which is a proper exercise of the jury's authority so long as the damages are not arbitrary or inflamed by passion or prejudice. Phelps v. Louisville Water Co., Ky., 103 S.W.3d 46 (2003); American Rockwell Intern. Corp. v. Wilhite, Ky. App., 143 S.W.3d 604 (2003).

Kentucky courts recognize that punitive damages awards are the "product of numerous and sometimes intangible factors. A jury imposing punitive damages must make a qualitative assessment based on a host of facts and circumstances unique to the particular case before it." Simpson County Steeplechase Ass'n, Inc. v. Roberts, Ky.App., 898 S.W.2d 523, 528 (1995) (citing TXO Production Corp. v. Alliance Resources Group, 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993)). There is no mathematical rule concerning the proportion that punitive damages must bear in relation to actual damages. In fact, in TXO Production Corp., supra, the U.S. Supreme Court upheld punitive damages that were 326 times that of the compensatory award.

In First Farmers Bank of Somerset, Inc. v. Henderson, Ky. App., 763 S.W.2d 137 (1988), the appellate court affirmed a punitive damages award of \$75,000 where the compensatory damages awarded were less than \$2,000 (after the trial court eliminated the jury's \$5,000 award for emotional distress). In First Farmers, the primary issue was the

tactics utilized by a bank in its “self help” repossession of a speed boat, in which the bank had a security interest, from a debtor’s garage over the objections of the debtor. The jury found the bank’s conduct to be egregious. In affirming the punitive damages award, the Court of Appeals noted:

Although the award does seem high, it is apparent that the jury believed Henderson's assertion that the Bank essentially stole his boat. It is also apparent that the able judge below is in a better position than we are to decide whether the jury's award was excessive. We, therefore, do not find the judge's decision overruling the Bank's post-trial motions clearly erroneous on the issue of excessiveness and hence affirm.

Id. at 142.

More recent cases from this Court, following direction from the United States Supreme Court, hold that a punitive damages award should be reviewed *de novo* by the appellate court, instead of merely analyzing whether the trial court abused its discretion. Sand Hill Energy, Inc. v. Ford Motor Co., Ky., 83 S.W.3d 483 (2001) (“Sand Hill I”), *cert. granted, vacated*, Ford Motor Co. v. Smith, 538 U.S. 1028, 125 S.Ct. 2072, 155 L.Ed.2d 1056 (2003); *on remand* Sand Hill Energy, Inc. v. Smith, Ky., 142 S.W.3d 153 (2004) (“Sand Hill II”). The Sand Hill cases did not involve claims under the Kentucky Consumer Protection Act. These cases reexamined the test for punitive damages awards in light of State Farm Mut. Ins. Co. v. Campbell, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003), a wrongful death action. Under Campbell and its progeny, the analysis now includes “(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.” Campbell, 538 U.S. at 418.

As noted by the Campbell court, “[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.” Id. at 419 (citing BMW of North America, Inc. v. Gore, 517 U.S. 559, 575, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996)). Factors in evaluating the reprehensibility of the defendant’s conduct include whether the target of the conduct had financial vulnerability and whether the harm was the result of intentional malice, trickery, deceit or mere accident. Campbell, 538 U.S. at 419. In the case at bar, the defendant’s conduct was directed at a young couple which it knew to be financially vulnerable and the defendant engaged in a pattern of deceit, particularly with regard to its actions involved in selling, and then concealing the sale of, the trade-in vehicle, all while continuing to threaten appellees. Even after applying a *de novo* standard to the case at bar, this Court should uphold the punitive damages award.

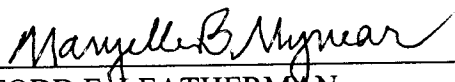
Lastly but perhaps most importantly, Campbell and its line of cases **still recognize** that punitive damages serve a broader purpose than that of compensatory damages, and that punitive damages are properly aimed at deterrence and retribution. Campbell, 538 U.S. at 415 (citing Restatement (Second) of Torts, sec. 903; Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001); Gore, supra). Here, the jury found that a Kentucky statute was violated and the punitive damages award is intended to deter similar conduct by both this Defendant and other businesses. By their very nature, the compensatory damages in this type of consumer case generally will be small. For economic deterrence to operate, therefore, the amount of a penalty must be significant. The punitive damages award of \$50,000 is not grossly excessive given the facts of this case, and should be upheld on appeal.

CONCLUSION

For the foregoing reasons, the Attorney General as *amicus curiae* respectfully urges this Court to affirm the decision of the Court of Appeals with regard to (a) the submission of the KCPA claim to the jury and (b) the award of \$50,000 in punitive damages.

Respectfully submitted,

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