



**ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY**



**STATE ex rel HORNE v. AUTOZONE, INC.
CV-11-0291-PR**

PARTIES:

Petitioner: Autozone, Inc.

Respondent: The State of Arizona

FACTS:

This case relates to the Arizona Consumer Fraud Act, A.R.S. §44-1521 through 1534, which was first enacted in 1967 to give the Attorney General a more effective means of controlling consumer fraud. This case addresses the interplay between that statutory scheme and the Arizona pricing statute, A.R.S. §41-2081 (2011), a statute that this Court has not considered.

AutoZone is one of the country's largest specialty retailers of automotive parts and accessories. In 2001, the Arizona Department of Weights and Measures began to inspect AutoZone's Arizona stores to verify its compliance with Arizona's retail pricing statute, A.R.S. §41-2081 (2011) (prohibiting a seller from misrepresenting the price, measure, or weight of a good offered for sale, and requiring a seller to display the price of a good on the good or at the point of display). Over the next five years, the Department fined AutoZone \$170,000 for violating the pricing statute, and AutoZone paid the fines without objection.

In 2006, relying on the Department's pricing audit data, the State sued AutoZone under the Consumer Fraud Act, A.R.S. §44-1522 (Supp. 2010) [proscribing both deceptive acts and practices in the sale or advertisement of merchandise ("acts clause"), as well as the concealment or omission of any material fact with "intent that others rely upon such" concealment or omission in the sale or advertisement of merchandise ("omission clause")]. The State's complaint alleged that from 2001 to July 2006, AutoZone had violated the Consumer Fraud Act by mispricing goods, meaning it offered for sale goods that displayed a price different than the price scanned at the register. The State also alleged AutoZone had violated the Act by offering for sale goods not priced either individually or at the point of display.

After discovery, the parties cross-moved for summary judgment. The superior court denied both motions, finding that disputed fact issues existed. In so ruling, the court denied the State's strict liability argument, ruling that the statute required the State to prove that AutoZone had intended to "post[] a price that is inaccurate and potentially misleading." The court also rejected the State's assertion that the act clause, and not the omission clause, applied to the lack of pricing on goods AutoZone offered for sale.

After additional discovery, the parties again cross-moved for summary judgment on liability. As before, they disputed whether the act clause required any showing of intent.

Without addressing all of the parties' arguments, a different division of the court, relying on the first ruling, entered summary judgment in AutoZone's favor "by necessity," *i.e.*, to allow the parties' disagreement regarding intent to be resolved on appeal. Accordingly, the court dismissed the State's claims and denied its cross-motion for summary judgment.

The State appealed, and AutoZone cross-appealed. The court of appeals affirmed in part, vacated in part, and remanded for further proceedings. It ruled that the Consumer Fraud Act neither imposes strict liability nor requires proof of intent to deceive, although it does require proof that the retailer acted voluntarily. The State made a prima facie showing that AutoZone had the requisite intent in offering to sell mispriced and non-priced goods. Further, Autozone's displaying one price on the shelf and charging another price at the register was deceptive under the Consumer Fraud Act. AutoZone's failure to post prices on goods or at their point of display also amounted to a deceptive act under the Act.

Finally, over Judge Gemmill's dissent, the court held the statute authorized the superior court to order disgorgement, if deemed appropriate, on remand. The majority, however, did not decide what AutoZone may be required to disgorge because such determinations require further factual development and legal analysis. The majority awarded the State its reasonable attorneys' fees on appeal pursuant to A.R.S. § 44-1534.

Dissenting, Judge Gemmill noted disgorgement is not part of the statutory scheme and differs from the statutory restitutionary remedy because funds recovered will go to the State, not to victims. Judge Gemmill would not construe the statute as affording a disgorgement remedy unless the legislature specifically stated such was an available remedy.

ISSUES:

1. Does the opinion err by failing to recognize the difference between "acts" and "omissions" under A.R.S. §44-1522(A), thereby negating an important clause of the Consumer Fraud Act?
2. Does the opinion err in judicially creating a disgorgement remedy not specified in the Act?
3. Does the opinion err in holding that because the elements of liability for the Act are different from the elements of liability under Arizona's pricing statute, the Act permits a second civil penalty for the underlying conduct that already was the basis for a civil penalty under the pricing statute?
4. Does the opinion err by awarding the State attorneys' fees pursuant to A.R.S. §44-1534 without analyzing whether *any* fee would be reasonable in light of the fact that the State has not proven that AutoZone violated the Act?

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