

In the  
**Supreme Court of Ohio**

STANLEE E. CULBREATH,	:	Case Nos. 2006-1302
	:	Decided September 5, 2007
Plaintiff-Appellant,	:	
	:	Appeal from the
v.	:	Franklin County
	:	Court of Appeals,
GOLDING ENTERPRISES, LLC., <i>et al.</i> ,	:	Tenth Appellate District
	:	
Defendants-Appellees.	:	Court of Appeals Case
	:	No. 05AP-2130, 2006-Ohio-2606

---

**MEMORANDUM OF *AMICUS CURIAE* THE STATE OF OHIO  
IN SUPPORT OF MOTION FOR RECONSIDERATION OF  
PLAINTIFF-APPELLANT STANLEE E. CULBREATH**

---

JOHN W. FERRON\* (0024532)  
*\*Counsel of Record*  
LISA A. WAFER (0074034)  
Ferron & Associates LPA  
580 North Fourth Street, Suite 450  
Columbus, Ohio 43215  
614-228-5225  
614-228-3255 fax  
jferron@ferronlaw.com

Counsel for Plaintiff-Appellant  
Stanlee E. Culbreath

KAREN S. HOCKSTAD (0061308)  
*\*Counsel of Record*  
Hockstad Law Office  
5003 Horizons Drive, Suite 200  
Columbus, Ohio 43220  
614-451-4227  
614-451-3156 fax  
khockstad@hockstadlaw.com

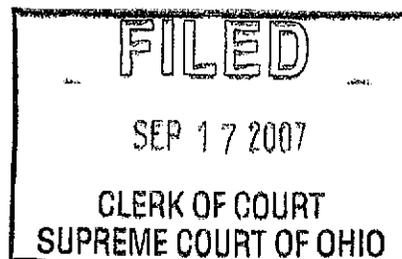
Counsel for Defendants-Appellees  
Karen Hockstad and  
Golding Enterprises, LLC

MARC DANN (0039425)  
Attorney General of Ohio

WILLIAM P. MARSHALL\* (0038077)  
Solicitor General  
*\*Counsel of Record*

ROBERT J. KRUMMEN (0076996)  
Deputy Solicitor  
ERIN B. LEAHY (0069509)  
Assistant Attorney General  
30 East Broad Street, 17th Floor  
Columbus, Ohio 43215  
614-466-8980  
614-466-5087 fax  
wmarshall@ag.state.oh.us

Counsel for *Amicus Curiae*  
The State of Ohio



JEFFREY J. JURCA\* (0012107)

*\*Counsel of Record*

BETH ANNE LASHUK (0063144)

6797 North High Street, Suite 314

Worthington, Ohio 43085

614-846-9228

614-846-9181 fax

Counsel for Defendants-Appellees

U.S. Four, Inc., W.D. Equipment Rental,

Inc., John Basinger, and Josh Wellington

**TABLE OF CONTENTS**

	<b>Page</b>
TABLE OF CONTENTS .....	i
INTRODUCTION .....	1
STATEMENT OF AMICUS INTEREST .....	2
ARGUMENT.....	3
A. The issue of whether an unsolicited facsimile advertisement is a per se violation of the CSPA was not before the Court and deserves a full airing .....	3
B. Precedent supports the principle that unsolicited commercial facsimile advertisements are per se violations of Ohio’s consumer law, and that support at least justifies preserving the issue for full review another day .....	4
CONCLUSION .....	8
CERTIFICATE OF SERVICE .....	unnumbered

## INTRODUCTION

The State of Ohio seeks reconsideration of only a narrow issue. The State does *not* ask this Court to revisit its holding in this case in any way that affects the issues properly before the Court or the outcome of the case for the parties involved. Instead, the State asks the Court to reconsider a short discussion in the opinion and the third finding in the Court's syllabus: namely, the suggestion that sending a consumer an unsolicited facsimile advertisement does not violate the Consumer Sales Practice Act (CSPA) unless the content of that facsimile is deceptive, unfair, or unconscionable. That language inadvertently spoke to an issue that was not before the Court and contradicts not only the Ohio Attorney General's Public Inspection File—a file that the Attorney General is statutorily required to maintain to document known CSPA violations—but it also contradicts the decisions of other Ohio courts to have considered the issue.

Judicial decisions are best made following full briefing of the issues. This settled practice ensures that the parties are provided with a full and fair opportunity to present arguments on those issues, and that the Court's decisions are based on full knowledge of the matters at hand and their potential effects. Here, the Court's statements regarding the legitimacy of CSPA claims for violations of the Telephone Consumer Protection Act (TCPA) were made without full consideration of applicable case law. The Court also had not been apprised that under the authority of R.C. 1345.05, the Ohio Attorney General, through the Public Inspection File (PIF), has previously declared violations of the TCPA to be *per se* violations of the CSPA. Because these matters were not presented to the Court, the Court should reconsider its decision and allow these important issues to be resolved upon full briefing in a future case when the issue properly arises.

The State of Ohio stresses that it does not challenge the Court’s resolution of this case or its findings on the accepted Propositions of Law. That is, the State does not challenge the Court’s findings with respect to the accepted and briefed Propositions of Law—namely, (1) that 47 U.S.C. 227(b) of the TCPA does not provide a private right of action for violations of 47 C.F.R. § 68.318(d); and (2) that “individual,” as used in R.C. 1345.01(A) of the CSPA, means natural persons and not business entities. *Culbreath v. Golding Ent., L.L.C.*, 114 Ohio St. 3d 357, 2007-Ohio-4278, ¶¶ 20, 28. The State was not involved in either briefing or oral argument on these rather straightforward issues. But the Court’s language implicating issues that were not briefed and could not have been anticipated has implicated the State’s strong interests and impelled this motion.

For the reasons described below, the Court should reconsider its judgment and remove both the language of the opinion and the syllabus indicating that unsolicited fax advertisements are not per se violations of the CSPA.

#### **STATEMENT OF AMICUS INTEREST**

Ohio Attorney General Marc Dann acts as Ohio’s chief law officer. R.C. 109.02. Accordingly, he serves as a lawyer for the State of Ohio and has a strong interest in ensuring rigorous and consistent enforcement of federal and Ohio consumer protection laws, including those involving telephone solicitations. As the State’s lawyer, the Attorney General has a responsibility to enforce the will of the General Assembly in passing legislation and the Governor in signing that legislation into law.

## ARGUMENT

### **A. The issue of whether an unsolicited facsimile advertisement is a per se violation of the CSPA was not before the Court and deserves a full airing.**

Basic fairness requires that courts not decide issues not before them. At a minimum, an appellate court or this Court must give the parties notice and an opportunity for briefing when contemplating a decision on a non-jurisdictional issue. *State v. 1981 Dodge Ram Van* (1988), 36 Ohio St. 3d 168 (citing *C. Miller Chevrolet v. Willoughby Hills* (1974), 38 Ohio St. 2d 298, 301).

Here, the Court reached beyond the scope of the briefs in deciding that unsolicited facsimile advertisements are not per se violations of the CSPA. Appellant had asked the Court simply to review the availability of redress for business entities under either the TCPA or CSPA for unsolicited commercial facsimile advertisements. More precisely, Appellant asked the Court to consider:

Proposition of Law No. 1: The Telephone Consumer Protection Act Permits an Individual Person Who Receives an Unsolicited Advertisement by Fax to Seek Statutory Damages from the Sender Based on Each Separate Violation of the TCPA and its Related Regulations

[and]

Proposition of Law No. 2: The Ohio Consumer Sales Practices Act Provides Remedies to an Individual Person Who Receives an Unsolicited Advertisement by Fax for Consumer Goods and/or Services, Even if He Receives it at His Place of Business

See Memorandum in Support of Jurisdiction of Appellant Stanlee E. Culbreath. The Court accepted those Proposition of Law for review and found that 47 U.S.C. 227(b) of the TCPA does not provide a private right of action for violations of 47 C.F.R. § 68.318(d), and that “individual,” as used in R.C. 1345.01(A) of the CSPA, means natural persons and not business entities. *Culbreath v. Golding Ent., L.L.C.*, 2007-Ohio-4278, ¶¶ 20, 28. That is all the Court needed to decide. But the Court went further, stating that unsolicited facsimile advertisements,

illegal under the TCPA, were not violations of the CSPA unless the content of those advertisements was unfair, deceptive, or unconscionable. *Id.* at ¶ 2.

Fairness requires that the Court, at a minimum, provide the parties notice and an opportunity to brief that issue. Because that did not happen here, the Court should reconsider its decision on the point, and allow the lower courts to litigate these matters. This Court can return to the issue some day if an appropriate case brings the issue to the Court.

**B. Precedent supports the principle that unsolicited commercial facsimile advertisements are per se violations of Ohio's consumer law, and that support at least justifies preserving the issue for full review another day.**

The Court should vacate its third holding not only because the issue was not before the Court (as explained above), but also because most authority supports the opposite conclusion, namely, that unsolicited facsimile advertisements, (and other violations of the TCPA), are also per se violations of Ohio's consumer law, the CSPA. That is not to say that the Court should fully reverse course and reach the opposite conclusion; rather, the State urges here that the opposing case is at least strong enough that the Court should step back from its premature conclusion and address the issue fully another day. While the State is strong in its belief that the issue is clear-cut in consumers' favor, all that matters at this stage, in this case, is that the issue is not so clear-cut in the other direction as to let that holding stand without a full airing.

First, as with all consumer issues, the Court starts with a presumption in consumers' favor. As the Court has often explained, the CSPA is "a remedial law which is designed to compensate for traditional consumer remedies and so must be liberally construed." *Whitaker v. M.T. Automotive, Inc.*, 111 Ohio St. 3d 177, 2006-Ohio-5481, ¶11 (quoting *Einhorn v. Ford Motor Co.* (1990), 48 Ohio St. 3d 27, 29). That principle of liberal construction means that all issues under the law, from what constitutes a violation, to what needs to be shown to prove a violation, to what makes a violation "knowing" for purposes of triggering attorney fees, are all read in the

consumers' favor if the law is ambiguous or uncertain in any way. Here, the law is not ambiguous, in the State's view, but even if it is, that ambiguity must be resolved in consumers' favor.

Second, the nature of a TCPA violation, such as an unsolicited fax ad, shows that such violations are inherently something that violates Ohio's consumer law, as every junk fax meets the Ohio standard of being an "unfair or deceptive act"—and that is so because it is always unfair to waste the recipient's resources in sending a junk fax. When Congress enacted the TCPA, it responded to public demands that the problem of junk faxes was real and needed correcting. Thus, Congress passed a law providing that "it shall be unlawful for any person within the United States... to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine..." 47 U.S.C. § 227(b)(1)(C). Congress, in banning this practice, recognized that junk faxes are unfair because, regardless of the content of the commercial message, such faxes unfairly shift the cost of the commercial advertising onto an unwilling recipient. The recipient must bear the cost of the ink, paper, personnel time, wear and tear on her fax machine, and so on. And the transmission ties up the fax line, preventing truly desired faxes from coming through right away, sometimes in critical circumstances. The State, as amicus, not only agrees with Congress that junk faxes are unfair, but also suggests that this unfairness automatically meets the CSPA standard of being an "unfair" and "deceptive act or practice." (And of course, if the junk fax proposes a sale, it meets the test of being in connection with a consumer transaction. In this particular case, the result will not change, based on the Court's holding that the business that received a junk fax was not a "consumer" under Ohio's CSPA.)

Third, every Ohio court to examine the issue has concluded that sending a junk fax in violation of the TCPA is also a per se violation of the CSPA. *Jemiola v. XYZ Corp.* (Cuyahoga C.P.), 126 Ohio Misc. 2d 68, 2003-Ohio-7321, ¶21 (“an advertiser’s failure to comply with the requirements of the TCPA is a violation of O.R.C. §1345.02(A) of the CSPA.”); *Compoli v. EIP Ltd.* (Cuyahoga C.P. July 1, 2002), Case No. 446780, slip op at 1; *Chambers v. R&C Delivery, Inc.* (Cuyahoga C.P. May 2, 2002), slip op at 1; *Charvat v. Continental Mortgage Services* (Franklin C.P. June 1, 2000), Case No. 99 CVH-12-10225, slip op at 8.

Last, the General Assembly, in enacting the CSPA, expressly required the Attorney General to keep a public file of acts that have been found to be CSPA violations—and the Court’s opinion was reached without taking that file into account. The Attorney General’s file, called the “Public Inspection File” (or PIF), includes all judgments by Ohio courts that determine whether specific acts or practices violate the CSPA. R.C. 1345.05(B). The General Assembly mandated the PIF so Ohio’s businesses would be on notice that certain consumer related acts are per se unfair, deceptive, or unconscionable under the CSPA. The General Assembly attached significance to the PIF by specifically providing that if a business commits an act already listed in the PIF as a per se violation, consumers may recover treble damages for such a per se violation. R.C. 1345.09.

The PIF is implicated here because, since June 2000, the Attorney General has included decisions finding that violations of the TCPA are violations of Ohio’s consumer laws. See, e.g., *Charvat v. Continental*, supra. Thus, Ohio businesses have been on notice that unsolicited fax advertisements are per se violations of the CSPA. The Court did not have this PIF information before it because the parties were unaware that the Court might decide this issue. The State, too, was unaware that the Court would address this issues, and had it know that the Court would

affect *this* consumer issue, as opposed to the business-to-business issues that the case raised, it would have stepped in. Thus, the State does so now, to preserve not only consumer's rights, but also the importance of the Attorney General's duty to maintain the Public Inspection File—a duty imposed on the Attorney General by the General Assembly.

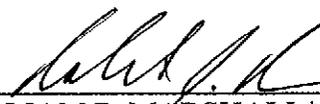
Thus, in light of the statutory text and these cases, all read through the lens of the liberal construction principle, the merits of the issue cannot be said to be clear-cut *against* finding a per se violation of the CSPA here or in similar cases. See *Einhorn*, 48 Ohio St. 3d at 29; *Jemiola*, at ¶22 (citing liberal construction principle and finding that junk faxes are a per se violation). Again, while the State supports the view that junk faxes are indeed a per se violation, all that the State asks today is that the Court step back from *any* holding on the issue for now, and allow parties and the Court to fully air the issue on another day.

## CONCLUSION

For the above reasons, this Court should reconsider its decision and remove both the language of the opinion and the syllabus indicating that unsolicited fax advertisements are not per se violations of the CSPA. These issues are best decided upon full briefing by parties in a case that truly raises the issue, and should first be properly analyzed by the lower courts.

Respectfully submitted,

MARC DANN (0039425)  
Attorney General of Ohio



---

WILLIAM P. MARSHALL\* (0038077)  
Solicitor General

*\*Counsel of Record*

ROBERT J. KRUMMEN (0076996)  
Deputy Solicitor

ERIN B. LEAHY (0069509)  
Assistant Attorney General  
30 East Broad Street, 17th Floor  
Columbus, Ohio 43215  
614-466-8980  
614-466-5087 fax  
wmarshall@ag.state.oh.us

Counsel for *Amicus Curiae*  
The State of Ohio

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Memorandum of *Amicus Curiae* State of Ohio in Support of Motion for Reconsideration of Plaintiff-Appellant Stanlee E. Culbreath was served by U.S. mail this 17th day of September, 2007, upon the following counsel:

John W. Ferron  
Lisa A. Wafer  
Ferron & Associates LPA  
580 North Fourth Street, Suite 450  
Columbus, Ohio 43215

Counsel for Plaintiff-Appellant  
Stanlee E. Culbreath

Karen S. Hockstad  
Hockstad Law Office  
5003 Horizons Drive, Suite 200  
Columbus, Ohio 43220

Counsel for Defendants-Appellees  
Karen Hockstad and  
Golding Enterprises, LLC

Jeffrey J. Jurca  
Beth Anne Lashuk  
6797 North High Street, Suite 314  
Worthington, Ohio 43085

Counsel for Defendants-Appellees  
U.S. Four, Inc., W.D. Equipment Rental,  
Inc., John Basinger, and Josh Wellington

  
\_\_\_\_\_  
Robert J. Krummen  
Deputy Solicitor