

IN THE SUPREME COURT OF OHIO

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Case No. 06-1302

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STANLEE E. CULBREATH

Appellant

vs.

GOLDING ENTERPRISES LLC, *et al.*

*Appellees*

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*On Appeal from  
Court of Appeals of Franklin County,  
Tenth Judicial District  
Case No. 05APE-11-1230*

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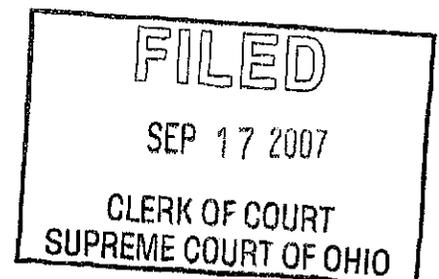
MEMORANDUM OF *AMICUS CURIAE*  
TELEPHONE CONSUMER RIGHTS BAR ASSOCIATION OF OHIO,  
IN SUPPORT OF  
APPELLANT STANLEE E. CULBREATH  
MOTION FOR RECONSIDERATION

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## INTEREST OF AMICUS

Amicus **Telephone Consumer Rights Bar Association of Ohio** is an organization of Ohio attorneys who are active in litigation on behalf of plaintiffs under the federal Telephone Consumer Protection Act (TCPA) and the Ohio Consumer Sales Practices Act (CSPA) against abusive intrusions by telemarketers and junk fax advertisers. The sole interest of the Amicus in this case is the proper interpretation of the TCPA and CSPA by this honorable Court.

This is the reason for the involvement of Amicus, and it is also the very crux of Appellees' motion for reconsideration. That interpretation is not only paramount to the correct application of the TCPA and CSPA by the courts of Ohio, but it is also critically important to Ohio consumers, who are daily victims of a flood of unwanted advertising messages transmitted to their telephones and fax machines.

It is these matters which give rise to the interest of Amicus. This honorable Court does not exist in a vacuum. The opinions of this honorable Court are decisive in interpreting the TCPA and CSPA, and are controlling authority upon the courts of Ohio when issues of a similar nature arise elsewhere in this state.

In this brief, Amicus urges this honorable Court to undertake reconsideration of its holding contained in its Syllabus at ¶ 3 in this case. This portion of the *Culbreath* ruling was made without any briefing on the underlying matter by any party in this case. Moreover, this particular holding overturns Ohio caselaw which has been consistent on this issue since 2002, if not earlier.

## ARGUMENT

**This court should revise its decision in this case, and hold that any fax transmission which violates the Telephone Consumer Protection Act is also an unfair or deceptive act or practice in violation of R.C. § 1345.02(A), as previously declared in prior court decisions on file with the Ohio Attorney General.**

The underlying case arises from a claim under the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227, and the Ohio Consumer Sales Practices Act (CSPA), R.C. Ch. 1345. The appellant's motion for reconsideration pertains to the issues of law raised by the holding contained in the Syllabus of this case, at ¶ 3.

The TCPA makes it unlawful "for any person 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). "The term 'unsolicited advertisement' means any material advertising the commercial availability or quality of any property which is transmitted to any person without that person's prior express invitation or permission". 47 U.S.C. § 227(a)(4).

The law is clear: no one may send an advertising fax to another unless the sender first obtains the "prior express invitation or permission" of the recipient. 47 U.S.C. §§ 227(a)(4) & 227(b)(1)(C). Every unsolicited fax advertisement violates federal law.

The Ohio CSPA prohibits "unfair or deceptive" business practices. See, R.C. § 1345.02(A). Ohio courts are authorized to declare any wrongful act or practice to be unfair or deceptive. The Ohio CSPA specifically authorizes a consumer to bring a cause of action under R.C. § 1345.09(B) based upon any act or practice previously declared by an Ohio court to be a violation of the CSPA, and subsequently included within the Attorney General's Public Inspection File ("PIF").

Since the year 2000, the courts of Ohio have held that any violation of the TCPA is an inherently unfair or deceptive act, in breach of R.C. § 1345.02(A) of the Ohio CSPA. *See, e.g., Charvat v. Continental Mtg. Svcs., Inc.*, [Case No. 99CVH12-10225], 2000 WL 35496823 (Franklin, C.P. 06/01/2000, PIF# 10001882). Subsequently, on the basis of this principle, Ohio courts have consistently held that an unsolicited fax advertisement, transmitted in violation of the TCPA, is a violation of R.C. § 1345.02(A) the CSPA statute. *See, e.g., Chambers v. R & C Delivery*, [Case No. 437887], 2002 WL 34097942 (Cuyahoga, C.P., 05/02/2002, PIF # 10002070); *Compoli v. EIP Limited*, [Case No. 446780], 2002 WL 34097943 (Cuyahoga, C.P., 07/02/2002, PIF # 10002073), *Grady v. St. Cloud Mtg.*, [Case No. 484945], 2003 WL 21190993 (Cuyahoga, C.P., 03/07/2003, PIF# 10002135), *Jemiola v. XYZ Corporation* (2003), 126 Ohio Misc2d 68, PIF # 10002205, at ¶ 21. This doctrine was also recognized, with approval, in *Dawson v. American Dream Home Loans* [Case No. 06CV000513], 2006 WL 2987104 (Lake C.P. Oct. 4, 2006) and by the Court of Appeals in *Bransky v. Shahrokhi* (Cuyahoga App. 2005), 2005-Ohio-79, 2005 WL 77084, PIF # 10002337, at ¶ 6.

A large-scale marketing campaign, conducted on the basis of unsolicited fax advertisements, is nothing less than massive *theft*, simply committed a dime at a time. It is no different than if an advertiser had invented a secret method to steal ten cents each from the bank accounts of thousands of consumers, and then used that money to subsidize the cost of mailing advertisements to those same consumers.

The sending of advertisements by fax without first obtaining permission from the recipient is an *inherently* unfair and deceptive act or practice, which thereby specifically violates R.C. § 1345.02(A) of the Ohio CSPA statute. This is clear as sunshine.

As noted above, the federal TCPA specifically prohibits the sending of commercial advertisements by fax without first obtaining the “prior express invitation or permission” of the recipient. 47 U.S.C. §§ 227(a)(4) and 227(b)(1)(C). The TCPA is designed to prevent the illegal use of the recipient's fax machine, and the theft of the recipient's supplies for the benefit of the sender, regardless of the amount of actual damages to any particular plaintiff.

The owner of a fax machine has the right to determine the disposition of his fax paper, ink and any other legitimate property in his possession. This right is **not** *de minimus*. As has been stated by the U.S. Supreme Court:

[P]roperty is more than economic value ... ;  
it also consists of the group of rights which the so-called  
owner exercises in his dominion of the physical thing,  
such as the right to possess, use, and dispose of it ...  
possession, control, and disposition are nonetheless  
valuable rights that inhere in the property.

*Phillips v. Washington Legal Foundation*, 524 U.S. 156, 170 (1998), Id. (internal quotations and citations omitted).

It is undeniably “unfair or deceptive” for a business to conduct its operations in violation of law, and/or in violation of the property rights of others. Failure to comply with a legal obligation is a violation of the Ohio CSPA. See, e.g., *Charvat v. Continental Mtg. Svcs., Inc.*, supra, PIF# 10001882 (and cases cited therein). Hence, the act or practice of sending unsolicited fax advertisements is a clearly “unfair and deceptive” act or practice, in breach of R.C. § 1345.02(A) of the Ohio CSPA.

## CONCLUSION

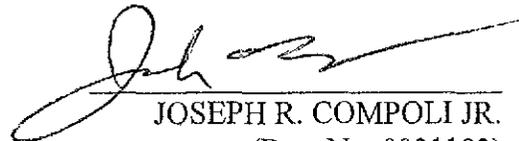
The author G.K. Chesterton once wrote that an advertisement is simply “the rich asking for more money.”<sup>1</sup> In the case of junk faxes, the advertiser is doing something more egregious more than that.

The advertiser is commandeering the recipient’s fax machine, paper and ink to print its advertisements – without any authority to do so. This is unquestionably a violation of the rights of a consumer under the Ohio CSPA, and this Court should so hold.

WHEREFORE, for all of the above reasons, the Appellant respectfully urges this honorable Court to revise its decision in this case, and hold that any fax transmission which violates the Telephone Consumer Protection Act is also an unfair or deceptive act or practice in violation of R.C. § 1345.02(A), as previously declared in prior court decisions on file with the Ohio Attorney General’s office.

Appellant further requests this Court to hold that the sending of unsolicited fax advertisements is an inherently unfair and deceptive act or practice, in violation of R.C. § 1345.02(A), since the advertiser is using someone else’s fax equipment, paper, ink and supplies to print its advertisements without obtaining prior express consent to do so.

Respectfully submitted,



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<sup>1</sup> *The New Jerusalem* (1920), p. 70.

**CERTIFICATE OF SERVICE**

A copy of the foregoing document was served this 2 day of September 2007

upon the below-named counsel, via regular first class U.S. mail:

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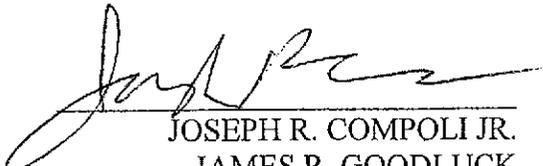
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