

IN THE SUPREME COURT OF OHIO

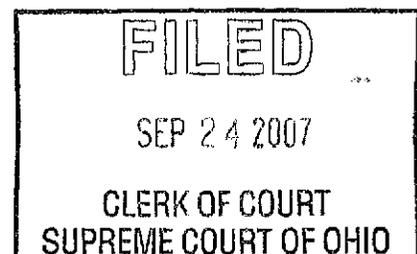
STANLEE E. CULBREATH, :
 :
 Appellant, : Case No. 06-1302
 :
 vs. : ON APPEAL FROM THE
 : FRANKLIN COUNTY COURT
 GOLDING ENTERPRISES, LLC, et al., : OF APPEALS TENTH
 : APPELLATE DISTRICT,
 Appellees. : CASE NO. 05APE-11-1230

APPELLEES' MEMORANDUM OPPOSING APPELLANT STANLEE E.
CULBREATH'S MOTION FOR RECONSIDERATION

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MEMORANDUM OPPOSING MOTION FOR RECONSIDERATION

Appellant Stanlee E. Culbreath has moved the Court to reconsider the third paragraph of the syllabus of its September 5, 2007 opinion claiming that “the issue and law upon which [said paragraph of the syllabus was] based was neither appealed, briefed, nor argued to the Court.” Appellant then takes a quantum leap by arguing that in reconsidering the third paragraph of the syllabus, this Court should replace it with one stating the exact opposite. Appellant’s motion goes too far, and should therefore be overruled by this court.

The third paragraph of the syllabus of this Court’s opinion states as follows:

The sending to and receipt by an individual of an unsolicited facsimile advertisement is not a violation of the Ohio Consumer Sales Practices Act [R.C. 1345.01, *et seq.*, (“OCSPA”)] unless the facsimile is deceptive, unfair, or unconscionable.

At page 1 of his Motion for Reconsideration, after accurately claiming this issue was neither appealed, briefed, nor argued to this Court, appellant asks this Court to reconsider this syllabus, and replace it with one stating the exact opposite legal conclusion:

In regard to a solicitation directed to a consumer, a violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.* (“TCPA”), constitutes an unfair or deceptive action or practice and, therefore, a violation of R.C. 1345.02(A) of the Consumer Sales Practices Act.

Appellees agree with the pronouncement of law this Court set forth in the third paragraph of its syllabus, as it succinctly summarizes R.C. 1345.02(A), which prohibits a supplier from committing an unfair or deceptive act or practice in connection with a consumer transaction. In this case, Appellant initially sought to make the OCSPA

applicable to transactions with a business and not an individual, even though the Act is expressly limited to consumer transactions involving an "individual." See, R.C. 1345.01(A), defining a "consumer transaction."

Appellant now asks this Court to hold, without any briefing, that the mere act of solicitation, without more, constitutes an OCSPA violation. But even if the facsimile transmission sent to a business in the instant appeal could somehow be construed as a solicitation within the context of a consumer sales transaction with an individual - - which this court has already held it cannot - - such solicitation must be deceptive in some way to create OCSPA liability. See, *Weaver v. J.C. Penney, Inc.* (1977), 53 Ohio App. 2d 165, 168 - 169. This is consistent with the Court's prior recognition that the OCSPA is violated when an unfair or deceptive act or practice in connection with a consumer transaction has occurred. See, e.g. *Brown v. Liberty Clubs, Inc.* (1989), 45 Ohio St. 3d 191, 193 - 194.

In support of his Motion for Reconsideration, Appellant erroneously claims "all of the trial and appellate courts of Ohio that have considered the issue of whether a supplier's violation of the [TCPA] is also a violation of the [OCSPA] have answered the question in the affirmative." (Appellant's Motion, at 1, emphasis in the original.) However, this issue was not even "considered" in the majority of the common pleas court cases cited by Appellant as they were rendered via consent judgment, or by default entries that appear to have been prepared by the plaintiff and/or plaintiffs' counsel. And two cases cited by Appellant - - *Charvat v. Ryan*, 168 Ohio App. 3d 78, 2006 Ohio 3705, ¶ 39 and *Bransky v. Shahrokhi*, 8th Dist. No. 84262, 2005 Ohio 97 - - actually belie Appellant's argument (Appellant's Motion, at 7). In *Charvat*, a dentist was

sued for having sent a pre-recorded, automated telephone call to a plaintiff who claimed that matters not set forth in that call constituted unfair or deceptive practices in violation of R.C. 1345.02(A). See, *Charvat*, at ¶ 5. Nowhere therein did the court of appeals unilaterally hold that the mere act of making the subject telephone call was an OCSPA violation.

In *Bransky*, the plaintiff/appellant appealed a damages award he received via default judgment, when that award was less than the statutory minimum amount of damages required for the statutory violations the plaintiff/appellant had alleged against the defendant who never answered the complaint. The court of appeals reversed and remanded, in order for the trial court to determine the amount of statutory damages to which the plaintiff/appellant was entitled. Most significantly, it appears quite clear that the plaintiff/appellant complained that the content of the subject communication from the non-answering defendant constituted a violation of R.C. 1345.02(A), and thus the mere solicitation in that case was not found to automatically violate the OCSPA. See, *Bransky* at ¶ 2. In fact, no Ohio appellate court has ever held that each and every violation of the TCPA is a *per se* violation of the OCSPA. Yet, this is precisely what Appellant asks this Court to do.

Appellees' initial argument in this appeal focused on the inapplicability of the OCSPA to Appellant - - a business - - who was therefore not "an individual" such that the facsimile transmission sent to him was not a "consumer transaction" as defined in R.C. 1345.01(A). Appellant never asked this court to consider a proposition of law declaring that any TCPA violation was a *per se* violation of the OCSPA. For this reason, there was no need for Appellees to specifically address that specific issue.

However, paragraph 3 of the syllabus accurately states the law -- that any act -- a solicitation, an advertisement or other promotion must be deceptive in order to violate the OCSPA. The Court's syllabus does nothing more than paraphrase R.C. 1345.02(A). For this reason, Appellant's Motion for reconsideration should be overruled.

Nor does the *Amicus Curiae* memorandum offer a valid reason to reconsider the Court's decision. Although this Memorandum was filed in support of Appellant's Motion for Reconsideration, the State makes it quite clear that it is not asking this Court to rewrite the third paragraph of the syllabus; rather the State of Ohio simply asks this Court to "step back from any holding on the issue for now, and allow parties and the Court to fully air the issue on another day." (Emphasis in the original.) If this Court decides to reconsider paragraph 3 of its syllabus, it should do so in the manner suggested by the State of Ohio, and not the outright reversal demanded by Appellant. The best resolution of this issue is to deny Appellant's Motion for Reconsideration altogether.

WHEREFORE, Appellees pray that this Court will deny Appellant's Motion for Reconsideration.

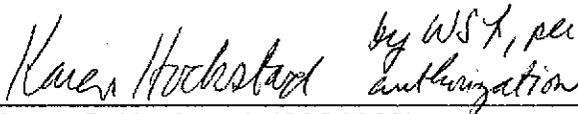
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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent via ordinary, U.S. mail, postage prepaid, this 24 day of September, 2007, to the following:

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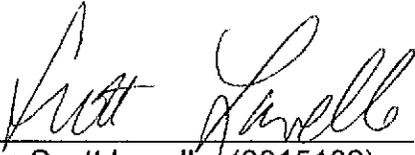
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