

**Summary of SC90275, *All American Painting, LLC, Consolidated Construction Group, Inc., Goodland Foods, Inc., and Titan Tube Fabricators, Inc. v. Financial Solutions and Associates, Inc.***

Appeal from the St. Louis County circuit court, Judge Larry L. Kendrick  
Argued and submitted Jan. 14, 2010; opinion issued June 29, 2010

**Attorneys:** All American and the other plaintiff companies were represented by Alan S. Mandel and Michael J. Sudekum of Schlueter, Mandel & Mandel LLC in St. Louis, (314) 621-1701, and Max G. Margulis of the Margulis Law Group of Chesterfield, (314) 434-8502; Financial Solutions and Associates was represented by Steven W. Koslovsky of Steven Koslovsky LLC in Maryland Heights, (314) 222-4066.

*This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.*

**Overview:** Four companies that received facsimile advertisements appeal the trial court's judgment against them in their claims under the federal telephone consumer protection act. In a unanimous decision written by Judge Patricia Breckenridge, the Supreme Court of Missouri reverses the judgment and remands (sends back) the case for further proceedings. The companies were entitled to a directed verdict or judgment notwithstanding the verdict against them because the facts to which the advertiser stipulated left no issues to be decided by the jury and conclusively established all the elements of the claim the companies were required to prove, and the advertiser waived its affirmative defense that the recipients expressly invited or gave permission to receive the facsimiles.

**Facts:** In 2005, Financial Solutions and Associates Inc. entered into a contract with advertising company Activecore Technologies Inc. to send facsimile advertisements promoting investment services Financial Solutions sold. Activecore sent advertisements on behalf of Financial Solutions that were directed to officers or employees of All American Painting LLC and three other companies, used the companies' corporate or fictitious names, and were received on facsimile machines or computers the companies owned. Financial Solutions did not seek permission from any of the recipients to send the advertisements. After receiving the advertisements, All American and the other companies sued Financial Solutions for violations under the federal telephone consumer protection act. During the ensuing jury trial, Financial Solutions' president and chief executive officer conceded that his company did not seek or receive permission or invitation from any of the plaintiff companies to send the advertisements and that his company did not have an established business relationship with any of the plaintiff companies. After his testimony, all the parties stipulated to certain facts. At the close of all the evidence, the plaintiff companies sought a directed verdict, which the trial court denied. The jury then returned verdicts in favor of Financial Solutions and against All American and the other companies. The plaintiff companies filed a timely motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. The trial court overruled the motion. The plaintiff companies appeal.

**REVERSED AND REMANDED.**

**Court en banc holds:** The trial court erred in denying All American and the other plaintiff companies a judgment notwithstanding the verdict.

A plaintiff is entitled to a directed verdict in the unusual situation in which the defendant has admitted in its pleadings, by counsel or through the defendant's individual testimony the basic facts of the plaintiff's case because, in such a situation, there is no question of fact remaining for the jury to decide. Here, the stipulated facts established all the elements necessary to prove violations of the telephone consumer protection act and to entitle the plaintiff companies to relief under the act. The plaintiff companies here have standing to sue because they have a legally protectable interest in the litigation as they are within the class of persons and entities intended to be covered by the act and they suffered injury by receiving the unauthorized facsimiles. The act makes it unlawful for a person or entity to send material advertising the commercial availability or quality of property, goods or services to a facsimile machine without the recipient's prior express invitation or permission. The act provides for \$500 in statutory damages for each violation of the act, injunctive relief against future violations, and assessment of treble damages when a court finds the sender "willfully or knowingly" violated the act. Financial Solutions stipulated that: it contracted with Activecore to send advertisements on its behalf; those advertisements were designed to generate business and to advertise products Financial Solutions sold; the advertisements were sent by facsimile; it had no reason to believe the plaintiff companies did not receive the advertisements; and that the copies of the advertisements admitted into evidence were true and accurate copies of those sent. Taken together, these stipulations conclusively established all the elements required to recover under the act, and the jury was required to accept those stipulated facts as true.

Further, the federal communications commission has interpreted the act as placing the burden to prove express invitation or permission on the sender of the advertisement, not the recipient, and this Court must accept the commission's interpretation, given the absence of a federal court of appeals' decision rejecting it. The evidence Financial Solutions presented at trial was not sufficient to prove the plaintiff companies gave Activecore express invitation or permission to send the advertisements, not could the jurors reasonably infer so from the testimony of Financial Solutions' president and chief executive officer. Additionally, by failing to proffer a jury instruction about the affirmative defense of prior express invitation or permission, Financial Solutions waived the defense. All American and the other plaintiff companies were entitled to judgment in their favor.