

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 21-2858 & 21-3393

CRAFTWOOD II, INC., doing business as
BAY HARDWARE, *et al.*,

Plaintiffs-Appellants,

v.

GENERAC POWER SYSTEMS, INC.,

Defendant-Appellee.

Appeals from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 1:17-cv-04105 — **Robert W. Gettleman**, *Judge*.

ARGUED SEPTEMBER 9, 2022 — DECIDED MARCH 30, 2023

Before ROVNER, HAMILTON, and SCUDDER, *Circuit Judges*.

ROVNER, *Circuit Judge*. In 2017, lawyers filed over 4,000 “junk fax” lawsuits under the Telephone Consumer Protection Act of 1991 (TCPA).¹ In this one, which has landed before

¹ See <https://webrecon.com/webrecon-stats-for-dec-2017-year-in-review/>; Sara Randazzo, *There’s Money in Faxes— for Plaintiffs*, Wall St. J., March 24, 2017.

us for a second time, two hardware companies sued a hardware store supplier for sending three facsimile advertisements that the hardware stores alleged the supplier sent in violation of the TCPA, 47 U.S.C.A. § 227. The district court concluded that the hardware stores consented to receipt of the faxed advertisements and granted summary judgment to the defendant supplier. Because we find a dispute of fact as to consent, we remand to the district court for further proceedings.

With today's pestilence of robocalls, scam calls, and texts pinging our attention away, it may be difficult to remember that there was a time when unsolicited faxes were the nuisance of the day. This is particularly true because at the time Congress passed the TCPA, unsolicited faxes had a monetary cost to the recipient in the form of lost ink and expensive fax paper. But today, with nary a facsimile machine in sight, many (or perhaps most) faxes go directly to an email address like other unwanted junk emails. The TCPA, however, still protects unwilling recipients from unsolicited faxes in the same way it always has, by granting statutory damages of \$500 for each violation of the Act (and three times that for willful and knowing violations). *See* 47 U.S.C. § 227(b)(3). Some of our cases have criticized "junk-fax litigation" as being fueled primarily by plaintiffs' attorneys looking for large fee awards—awards that often come at the expense of small businesses. *Bridgeview Health Care Ctr., Ltd. v. Clark*, 816 F.3d 935, 941 (7th Cir. 2016) ("We doubt that Congress intended the TCPA, which it crafted as a consumer-protection law, to

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become the means of targeting small businesses.”)² But as we noted when this case was before this court the first time, “[w]hether it is good public policy to use the cumbersome and costly process of adjudication to resolve disputes about annoying fax ads is for Congress to decide.” *Craftwood II, Inc. v. Generac Power Sys., Inc.*, 920 F.3d 479, 481 (7th Cir. 2019). Congress has not told us otherwise, and so we continue to diligently decide cases as they travel from district court to appellate court and back again, as this one illustrates. And regardless of whether it is good public policy to use so many court resources and so handsomely reward litigiousness over annoyances that have been greatly diminished by changes in technology, the plaintiffs are entitled to use the law to enforce their right not to receive unsolicited faxes. And we are obligated to follow the law as Congress has written it.

I.

This case involves a total of three facsimile advertisements sent to two hardware stores in Southern California owned and operated as a family business by David and Cynthia Brunjes. They established one store, Craftwood II (also called

² For example, Craftwood Lumber Company (an entity that shares an owner/president in common with the Craftwood entities in this case) received \$25,000 as an incentive award for acting as a class representative in a TCPA suit against Interline Brands in which the total settlement award was \$40 million. Counsel for that case (the same firm that represents the Craftwood Stores in this case) received \$9.5 million in fees. *See Craftwood Lumber Co. v. Interline Brands, Inc. et. al.*, No. 1:11-cv-04462 (N.D. Ill.), R. 152 at 9, 12. As of the date of David Brunjes’ deposition in the case before us now, various Craftwood entities had been involved in about a dozen TCPA cases. *See* R. 253-6 at 57 (D. Brunjes Dep. at 223). A Westlaw search indicates that the same law firm, Payne and Fears, LLP, has represented the Craftwood entities in each of these suits.

Bay Hardware) in 2009, and in 2013, they established Craftwood III (also called Lunada Bay Hardware, but we will call them Craftwood II and III respectively for simplicity, and together, the “Craftwood Stores”). Craftwood II is operated by the Brunjes’ daughter, Diana Newton, and another manager. Newton also oversees Craftwood III along with a different manager. Although the Craftwood Stores are independent hardware stores, they are part of the Do It Best (DIB) hardware industry cooperative and wholesaler. By joining the cooperative, hardware stores receive access to better prices from vendors, as well as advertising and buying assistance.

The defendant, Generac Power Systems, is one of many companies that supplies goods to DIB for purchase by hardware retailers who belong to the DIB cooperative. Those retailers in turn sell Generac’s wares to the public. Generac had an agreement with Comprehensive Marketing, Inc. (CMI), an independent sales and marketing representative that assisted Generac, along with many other DIB vendors, to get their products from the vendor to the market, including by assisting with promotional materials and other marketing ventures. As part of its role, CMI sent out faxes to DIB-member hardware stores advertising deals on Generac products, including the three at issue in this case—one sent in July 2016 to Craftwood II, and one in February 2013, sent to both Craftwood Stores. All three faxes were addressed to the “Store Manager/Owner.” R. 1-1, 1-2, 1-3.

The Craftwood Stores sued Generac and CMI, claiming that those three faxes were sent in violation of the TCPA, which forbids any person or entity from using “any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement.” 47

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U.S.C. § 227(b)(1)(C). The Craftwood Stores dismissed the suit against CMI on December 27, 2019, and thus only the actions against Generac remain. The claims include requests for individual and class action relief, including statutory damages of \$500 for each violation, treble damages for any intentional violation, injunctive relief, and attorneys' fees and costs.³

The district court initially dismissed the case finding that the Craftwood Stores lacked standing to bring their claim (*Craftwood II, Inc. v. Generac Power Sys., Inc.*, No. 17 C 4105, 2018 WL 11468610, at *2 (N.D. Ill. Aug. 1, 2018)), but we reversed and remanded, allowing the case to proceed. *Craftwood II*, 920 F.3d at 483.

On remand, Generac's defense relied on the TCPA's exemption for faxes sent where the recipient gave "prior express invitation or permission, in writing or otherwise." 47 U.S.C.A. § 227(a)(5). As evidence of consent, Generac pointed to the agreement that the Craftwood Stores' representative signed when the companies joined the DIB cooperative, which Generac claims contained language demonstrating that the Craftwood Stores consented to receiving faxes from suppliers. The first paragraph of that agreement stated:

The Corporation agrees to sell its goods and provide its advertising programs, training services and other programs to Member (so long as Member makes timely payment therefore) at the Corporation's established

³ In consideration for various promises by the defendant, the plaintiffs stipulated to withdraw, without prejudice, their pending protective motion for class certification. R. 122. Thus there are no class certification issues before us on appeal.

prices, terms, and conditions and in accordance with the Corporation's established business policies and practices which are in effect from time to time, for sale and use by Member

R. 253-12 at 1 (R. 259 at 1). In return, the member agrees to purchase most of its products from DIB. In a later part of the agreement, there is a place for the applicant to provide contact information, including a fax number, which the Craftwood Stores provided.

One of the optional services that DIB provides to cooperative members is an opportunity to receive advertising materials that a member store can purchase to send to its own customers. And so, for example, rather than creating its own marketing material, catalogues, coupons, or flyers, a DIB member hardware store can sign up to receive these types of promotional materials to send to its customers. Craftwood II and III both opted into one such program called the Ad-Pak program. According to DIB's online information for cooperative members, the Ad-Pak program "includes more than 50 promotions designed to help drive traffic, develop customer loyalty, and build your local brand. ... We'll help you identify the best weeks of the year to promote your products, secure outstanding deals, and customize all marketing components so you're telling a relevant, local story to your customers." R. 272-2 Ex. B, p.2.

The district court ultimately granted summary judgment for Generac, finding that the contract between the Craftwood Stores and DIB evinced an agreement by the former to receive faxes, including from vendors. As support for its conclusion, the district court focused on the explicit language of the

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agreement quoted above, along with the fact that the plaintiffs provided their fax number as contact information in a later part of the document, and, to a lesser extent, that the plaintiffs had opted into the Ad-Pak program. The court found further support from the testimony of a CMI employee who testified that she received direct permission to send fax advertisements in a telephone call to Craftwood II. We review the district court's grant of summary judgment de novo, interpreting the facts and drawing reasonable inferences in the light most favorable to the Craftwood Stores. *Physicians Healthsource, Inc. v. A-S Medication Sols., LLC*, 950 F.3d 959, 964 (7th Cir. 2020). We will affirm the entry of summary judgment only if there are no issues of material fact and the movant, Generac, is entitled to judgment as a matter of law. *Id.*

II.

A.

Prior express consent is an affirmative defense on which Generac bears the burden of proof. *Id.* Generac claims that it can demonstrate prior express permission, and thus avoid liability under the TCPA, in two ways. First, it claims that the written agreement between the Craftwood Stores and the DIB cooperative gave Generac permission to send the faxes. Second, it claims that an employee of CMI received express permission during a phone call with Craftwood II. We will consider each of these in turn.

Generac argues that the Craftwood Stores gave express permission to receive faxed advertising by entering into a membership agreement which mentioned "advertising programs" and then providing their fax numbers. The district court agreed, holding that the combination of the term

“advertising program” and plaintiffs’ provision of their fax number constituted express permission to receive fax advertisements. D. Ct. Op. (R. 16) at 9. That conclusion, however, does not accurately reflect the actual language of the agreement.

Our circuit interprets the TCPA in favor of consumer protection. *A-S Medication Solutions*, 950 F.3d at 967. In defining what constitutes express permission, we have made clear that “[e]xpress permission to receive a faxed ad requires that the consumer understand that by providing a fax number, he or she is agreeing to receive fax advertisements.” *Id.* at 965 (quoting 18 FCC Rcd. at 14129). The permission may be written or oral, but it must be affirmative; the sender may not presume permission unless otherwise advised. *Id.* Evidence of permission to send faxes generally does not establish prior express permission to fax advertisements. *Id.* at 966. And so, for example, permission to receive product information by fax does not grant permission to receive faxed advertisements. *Id.* at 967. Moreover, permission to receive a single faxed advertisement does not grant permission to send more faxes on an ongoing basis, unless the permission affirmatively and explicitly gives the advertiser permission to send the faxes on an ongoing basis. *Id.* at 966. It would be fair to summarize from all of this that our case law requires some fairly specific and reliable indicia of permission.

With those standards in mind, we turn to the cooperative agreement that Generac asserts gave it permission to send faxes to the Craftwood Stores. If we reduce the agreement language to its relevant parts—those that reference advertising—“The Corporation agrees ... to provide its advertising programs to Member (so long as Member makes timely payment

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therefore) ... , for sale and use by Member.” R. 253-12 at 1 (R. 259 at 1). On its face, this is language that DIB has agreed to do something—provide advertising programs—in exchange for payment from the Craftwood Stores. Stating that “DIB agrees to provide advertising programs as long as Craftwood timely pays” would be an odd way to say “Craftwood agrees to receive fax advertising from DIB.” Moreover the agreement speaks of “advertising programs ... for sale and use by [the Craftwood Stores].” The implication of this language is that DIB will provide marketing materials for the member hardware store to distribute to their customers, in exchange for remuneration. In other words, the intended audience for the advertising Craftwood was purchasing was its customers, not Craftwood itself. But in any event, we need not decide whether this language gave DIB permission to send fax advertising. For even if it did give permission to DIB, it certainly did not give Generac permission to send fax advertising. Generac was not a party to the agreements and we have concluded that express permission under the TCPA is not transferable, as it is the sender itself who must procure that permission. *See A-S Medication Sols.*, 950 F.3d at 967 (noting that it would eviscerate the statutory scheme to allow a company to solicit express prior permission to send fax advertisements and then transfer that permission to a completely different company who in turn may send advertisements with impunity). We find, as a matter of law, that whatever the agreement may have said about the relationship and permission between DIB and the Craftwood Stores, there was no language in the agreement that can be read as indicating that the Craftwood Stores gave prior express consent to receive fax advertising from Generac.

Although it does not appear to be the primary basis for the decision, the district court also mentioned the Ad-Pak program as further evidence of an agreement to receive advertising programs. D. Ct. Op. (R. 16) at 7. (“... and plaintiffs opted into the Ad-Pak program.”). But as the district court conceded, two of the three faxes—the ones date-stamped 2-13-2017 and sent to both Craftwood Stores—were fax ads targeted exclusively to the hardware stores themselves as opposed to their customers, and thus were not the types of advertisements contemplated by the Ad-Pak program at all. *See* D. Ct. Op. (R. 16) at 7, n.3. The other fax (date-stamped 7-28-2016 and sent only to Craftwood II), included a cover letter addressed to the hardware store on the first page and an extended warranty form for customers to fill out on the second page. R. 1-2, 1-3. Whether this latter fax was part of the Ad-Pak program to which the Craftwood Stores subscribed is a question of fact that can be resolved, if necessary, on remand. The two ads sent to each of the Craftwood Stores on 2-13-2017 could not have been part of the Ad-Pak program that provided advertising to pass along to customers. They were unequivocally advertisements targeted at the hardware stores themselves.

In sum, we can rule out the contract language as sufficient evidence that the Craftwood Stores gave Generac “affirmative[] and explicit[]” prior express permission to fax advertisements to the stores. *See A-S Medication*, 950 F.3d at 966. Our conclusion does not conflict with the Eleventh Circuit’s decision in *Gorss Motels, Inc. v. Safemark Sys., LP*, 931 F.3d 1094 (11th Cir. 2019). In that case, the Eleventh Circuit found that hotel franchisees who entered into agreements with Wyndham Hotel Group had given prior express permission to Wyndham’s affiliates to send fax advertisements when it

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signed a franchise contract “agreeing that Wyndham affiliates could offer assistance with purchasing items for the hotels and by providing their fax numbers” *Id.* at 1100. The agreement in the case before us contains no equivalent express language allowing DIB’s affiliates to offer optional assistance in purchasing items or any other similar agreement to receive assistance from affiliates. It makes no mention of affiliates at all. Whatever our circuit might make of the language in the agreement in *Gorss Motels*, particularly in light of our clarifying decision in *A-S Medication Solutions*, we cannot say, but we can note that the agreement here between DIB and the Craftwood Stores contains no language whatsoever allowing affiliates to offer purchasing assistance. When and if we encounter an agreement closer to the one analyzed in *Gorss Motels*, we can assess whether our understanding of express prior consent aligns with that of the Eleventh Circuit.⁴

Our conclusion about the contract language, however, does not end the matter. Generac alleges that it received permission in a second and more direct fashion. According to Generac, CMI received direct permission to send faxes to Craftwood II on behalf of Generac when, in 2012, an employee of CMI, Sherri Davis, called Craftwood II and asked for the store’s fax number for the purpose of sending promotional materials “generally and on an ongoing basis.” Generac Brief at 10. We note from the start that this argument only applies to Craftwood II, as Generac does not claim that Davis ever

⁴ This Circuit recently resolved an appeal of another of *Gorss Motels* TCPA suits. *Gorss Motels, Inc. v. Brigadoon Fitness, Inc.*, 29 F.4th 839 (7th Cir. 2022). That appeal concerned the denial of class action certification and is not directly relevant to the substance of the dispute before us now.

called Craftwood III, and indeed she could not have, as Craftwood III was not incorporated until 2013.

According to Generac, in 2012, Davis worked on a project for which she was to record on a spreadsheet a list of DIB co-operative members who would be interested in receiving promotional material from DIB vendors, such as Generac. Davis testified at her deposition that she called each entity on the list and said, "I was wondering if I could get your fax number in order to send you some promotions." R. 253-3 at 28 (Davis Dep. at 104).⁵ Specifically, as it pertains to Craftwood II, Davis stated in her August 14, 2019 declaration that on May 12, 2012, she placed a phone call to "the Craftwood stores to obtain their fax number in order to send them promotional sales materials. During these telephone calls, Craftwood provided to me in 2012 their fax numbers for the express purpose of CMI to provide [sic] Craftwood with sale promotions by fax." R. 253-16 at 2. In her later deposition, on July 22, 2020, Davis admitted that she did not recall the specifics of the conversation with Craftwood II, including to whom she spoke or what was discussed, but according to her system, if a store agreed

⁵ Generac's brief states that "Davis requested Craftwood II's 'fax number to send [it] promotions' generally and on an ongoing basis." Generac Brief at 10. As support for this proposition, it cites to Davis' deposition at R. 253-3 at 28 (Davis Dep. at 102). At oral argument the court asked Generac to clarify where specifically in the record it found support for the "generally and on an ongoing basis" language. Generac filed a post-argument memorandum in which it cited to Davis' statement that her project involved "gathering fax numbers in order to send promotions," and other references to "promotions" in the plural as evidence that the permission granted was not limited in time or number. Appellate Court Record at 37. It will be the job of a factfinder to determine whether this is sufficient evidence of ongoing permission.

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to receive fax promotions, she recorded its fax number in the final column on her spreadsheet, and, although she did not recall the specific conversation, by looking at her spreadsheet, she was able to see that Craftwood II's fax number was recorded in the final column of the spreadsheet, thus indicating that it had given permission to receive fax advertisements.

Generac describes Davis' testimony that she received permission as "uncontested," and the district court agreed, but we find that conclusion to be at odds with the party's factual assertions in this case. Craftwood II's representatives presented ample evidence from the record supporting its stance that the call did not and could not have happened, as the store has a longstanding policy against giving permission to receive faxes. *See* R. 272-2 at 2 (Newton Dec. at ¶¶6, 7, 9, 11); R. 253-6 at 62–64 (D. Brunjes Dep. at 244–249); R. 253-7 at 46–47, 49 (Newton Dep. at 179-182, 192); R. 272-1 at 1–4 (D. Brunjes Dec. at ¶¶ 4–7). Craftwood II also points out that Davis' spreadsheet was labeled "DIB Lutron Fax List with Revisions," and was created in 2012, and so, at best, it would be evidence of permission for one particular fax, but not of ongoing permission to send unlimited faxes.

This is a classic factual dispute: Generac's witness, Davis, testified that she made a phone call to and received permission from Craftwood II to send it fax advertisements. Craftwood II, on the other hand, asserts that it never received any such call and that it has and had a longstanding policy of not giving approval for fax advertisements. On summary judgment a court cannot "weigh conflicting evidence, resolve swearing contests, determine credibility, or ponder which party's version of the facts is most likely to be true." *Runkel v. City of Springfield*, 51 F.4th 736, 742 (7th Cir. 2022) (quoting

Stewart v. Wexford Health Sources, Inc., 14 F.4th 757, 760 (7th Cir. 2021)).

The depositions certainly leave room for a fact finder to assess the credibility of witnesses and the likelihood both that the phone call occurred and that Craftwood II's "no fax" policy was as clear, known, and disseminated to its employees as Craftwood II asserts that it was. The testimony by both parties shifted and curved throughout this litigation, and sometimes within the course of a single deposition.⁶ But all of these present credibility issues for a jury. None of these assertions are so implausible on their face that a reasonable jury could not find in Craftwood II's favor on this factual dispute. *See Kodish v. Oakbrook Terrace Fire Prot. Dist.*, 604 F.3d 490, 507 (7th Cir. 2010) (citing *Payne v. Pauley*, 337 F.3d 767, 773 (7th Cir. 2003)).

Because the contract language could not have been interpreted to mean that the Craftwood Stores granted anyone permission to send them fax advertisements, and there is a material factual dispute as to whether Craftwood II gave

⁶ For example, David Brunjes at first stated that he did not recall if Sheri Davis had contacted him in May 2012 to obtain his express permission to send a faxed promotion. R. 253-6 at 54 (D. Brunjes Dep. p. 212). He later testified, after a break and consultation with his lawyer, that "I would have recalled a conversation like that." R. 253-6 at 63 (D. Brunjes Dep. at 245-46). Diana Newton at first testified that that she did not recall whether she took a call from Davis nor did she know if anyone else would have given out the fax number, but then, after a break and consulting with her attorney, stated with certainty that no one in the store would have given out the fax number. Compare R. 253-7 at 46 (Newton Dep. at 179-80) with Id. at 47 (Newton Dep. at 181-82).

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Davis prior express permission to send faxes, we remand for further proceedings.

B.

One final matter remains on the table: the Craftwood Stores argue that the district court made a mistake of law when calculating costs by awarding the defendant PACER and computerized research charges in the amount of \$3,555.30. Although our reversal may alter the assessment of costs at the end of the day, we note once again that PACER and computerized research costs are not separately recoverable as costs.

We made clear in *Haroco, Inc. v. Am. Nat'l Bank & Trust Co.*, 38 F.3d 1429, 1440 (7th Cir. 1994) that computerized research costs are not recoverable under 28 U.S.C. § 1920, as they are not specifically enumerated in the statute, and are instead considered a form of attorneys' fees. *Id.* at 1440. Attorneys' fees are not separately recoverable expenses. *Montgomery v. Aetna Plywood, Inc.*, 231 F.3d 399, 409 (7th Cir. 2000). In *Haroco*, we explained that computerized research is properly categorized as attorneys' fees because "the added cost of computerized research is normally matched with a corresponding reduction in the amount of time an attorney must spend researching," and therefore there is "no difference between a situation where an attorney researches manually and bills only the time spent and a situation where the attorney does the research on a computer and bills for both the time and the computer fee." *Haroco*, 38 F.3d at 1440–41. Although we have not stated it directly, our conclusion that computer research charges are considered a form of attorneys' fees and not costs applies equally to PACER research, which is, of course, just another form of computerized research. This is certainly how

the district courts have interpreted our decision in *Haroco*, and they are correct. See, e.g., *Pezl v. Amore Mio, Inc.*, No. 08 C 3993, 2015 WL 2375381, at *6 (N.D. Ill. May 13, 2015) (denying costs for PACER research); *Freedom Mortg. Corp. v. Burnham Mortg., Inc.*, No. 03 C 6508, 2008 WL 4534162, at *2 (N.D. Ill. Oct. 3, 2008) (denying costs for PACER research); *Angevine v. WaterSaver Faucet Co.*, No. 02 C 8114, 2003 WL 23019165, at *9 (N.D. Ill. Dec. 23, 2003) (“charges for Pacer research fall into the same category as Westlaw and Lexis computerized research charges” and “are not recoverable as costs under § 1920.”).

Generac cites dicta in one of our decisions suggesting that computerized research charges are recoverable under § 1920. *Little v. Mitsubishi Motors N. Am., Inc.*, 514 F.3d 699, 701 (7th Cir. 2008) (“Mr. Little contends that the award of costs for copies, computerized research, summonses, subpoenas, delivery services and a video-recorded deposition are not authorized by 28 U.S.C. § 1920. We disagree. All of the above costs are authorized by § 1920.”). However, *Little* did not discuss the rationale nor the authority for this proposition. In fact, one month later, this court reiterated the rule that computerized legal research expenses are properly categorized as attorneys’ fees. *Tchemkou v. Mukasey*, 517 F.3d 506, 513 (7th Cir. 2008). This sentence in *Little* is non-controlling and does not overturn long-standing precedent in *Haroco*.

We REVERSE the grant of summary judgment for Generac and REMAND for proceedings consistent with this opinion.